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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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1938

Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *ss.* 1 (1) (5), 2 - - **Davies J. 272**

1949

Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *ss.* 2 (2) (*e*), 17 (1) **C.A. 179**

—— —— *s.* 12 (2) (*b*) - - **Barnard J. 13**

1950

Adoption Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 1, 4, 18 (1) (*b*) - - **Davies J. 135**

Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 1, 4, 18 (1) (*b*) **Davies J. 135**

—— —— *s.* 20 (2) - - - **Divl.Ct. 26**

—— —— *s.* 23 - - - **Barnard J. 150**

—— —— *s.* 30 (3) - - - - **C.A. 54**

AUSTRALIA

New South Wales Matrimonial Causes Act, *No.* 14, 1899, *s.* 16 (*a*) - **C.A. 246**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Legal Aid (General) Regulations, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 17 (1) **C.A. 179**

Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940) (*L.*27), *rr.* 62 (2), 80 **Davies J. 192**

—— —— *r.* 65 (3) - - **Barnard J. 13**

—— —— *r.* 65 (3) - - - - **C.A. 41**

Matrimonial Causes Rules, 1950, *r.* 80

Regulations for Preventing Collisions at Sea (*S.R. & O.* 1910, *No.* 1113), *arts.* 4 *and* 29 - - - **C.A. 117**

R.S.C. Ord. 25, *r.* 5 - - - **C.A. 161**

Ord. 65, *r.* 27 (29) - - - **C.A. 1**

Ord. 67, *r.* 6 - - **Davies J. 192**

ERRATUM

Dixon v. *Dixon* [1953] P. 103 at 116. Line 10. Delete "Not."

CASES

DETERMINED BY THE

PROBATE DIVORCE & ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

LYON *v.* LYON.

C. A.

1952
Oct. 16, 17.

Singleton,
Birkett and
Morris L.JJ.

Costs—Taxation—Legal aid—Solicitor and client costs—Where costs are to be paid out of a common fund in which the client and others are interested—Full value of item of work done allowed in party and party column—No justification for additional fee in solicitor and client column—R.S.C., Ord. 65, *r.* 27 (29).

A petitioning wife, who had been granted legal aid, obtained a decree nisi for divorce with costs against the respondent. Her solicitor brought in a bill of costs, charging ten guineas for "Instructions for brief" in the column for party and party costs, with an additional sum of five guineas in the column for solicitor and client costs—fifteen guineas in all. The registrar allowed nine guineas for this item as party and party costs and, since he found that this amount was the full value of the work done, he said that he did not consider that any further allowance could be made in the column for solicitor and client costs. Accordingly, he refused to allow the claim for five guineas in the column for solicitor and client costs:—

Held, that the court would not interfere with the registrar's finding which, indeed, was not challenged, and that on that finding his decision was correct.

Gibbs v. *Gibbs* [1952] P. 332 distinguished.

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Appeal from an order of his Honour Judge Richardson, a Special Commissioner in Divorce, upholding an order for taxation of costs made by Mr. District Registrar Spark.

On an undefended petition, the petitioner, who had obtained a certificate under the Legal Aid and Advice Act, 1949, entitling her to legal aid, was granted a decree nisi for dissolution of her marriage, and it was ordered that the respondent should pay the costs of the suit and also that her costs should be taxed as between solicitor and client. By paragraph 4 (1) of Sch. III to the Act of 1949: " Subject to the last foregoing paragraph, costs " shall be taxed for the purposes of this Schedule " (which concerns the remuneration of persons giving legal aid under Part I of the Act) " according to the ordinary rules applicable on a " taxation as between solicitor and client where the costs are to " be paid out of a common fund in which the client and others are interested. . . ."

The solicitors who had been acting on behalf of the petitioner brought in a bill of costs in four columns as is required. (See Note on Procedure on Taxation, at p. 416, of Sachs on Legal Aid.) The largest item in the bill was No. 53: " Instructions for brief, " including attendance upon the petitioner and five witnesses (all " the witnesses being interviewed at Whitley Bay), obtaining " history of the marriage and lengthy statements, considering " evidence and generally preparing case for hearing, including " 25 attendances and eight letters not otherwise charged for." The bill rendered included in the column for party and party taxation a claim for 10 guineas for this item, and in the column for solicitor and client costs a claim for an additional five guineas —15 guineas in all. The registrar came to the conclusion that for party and party costs against the respondent in the suit nine guineas should be allowed as party and party costs and nothing further under the head of solicitor and client costs. The registrar said that as he regarded the allowance made in the item for party and party costs as the full value of the work done, he did not consider that any further allowance could properly be made.

There were six other items in the bill—Nos. 1, 34, 46, 71, 90 and 99—in which the charge in the party and party column was 13s. 4d., with a further charge of 6s. 8d. in the column for taxation as between solicitor and client. For example, No. 71: " Dec. 6. Attending hearing of maintenance application when " order was made for £2 per week," where 13s. 4d. was charged in the party and party column and 6s. 8d. additional in the solicitor and client column. Again, No. 90: "Jan. 25, 1952. "Attending hearing when order made for permanent maintenance, where 13s. 4d. was charged in the party and party column "and 6s. 8d. additional in the solicitor and client column." With regard to these items the registrar allowed the full amount claimed in the party and party column—13s. 4d.—but he said that since in his view the amount so charged represented the full value of the work done, he declined to allow any further sum in the solicitor and client column. "To do so would make the legal "aid fund liable for a fee which had not been earned."

The total party and party costs were taxed at £75 16s. 0d., including the 50 per cent. addition to profit costs and the solicitor and client costs at £78 6s. 6d., the sum of £9 4s. 10d. having been taxed off the solicitor and client costs charged.

The petitioner appealed to the Commissioner.

In giving judgment his Honour Judge Richardson said: "R.S.C. Ord. 65, r. 27 (29), is the rule which provides the "standard which the taxing officer must apply to all kinds of "taxation. It would seem, therefore, that it is open to the "taxing officer to allow all costs properly incurred for the attainment of justice which are not excluded by the latter part of "R.S.C. Ord. 65, r. 27 (29).

"It appears to follow from the above-mentioned rule that "party and party costs are intended to include full payment in "respect of the work done which is necessary to obtain justice. "Solicitor and client costs are on a more generous basis than "party and party costs. This is necessarily so as there are many "items of costs allowable in a solicitor and client bill which "cannot be allowed in a party and party bill.

"In this case the taxing officer disallowed certain items in "the solicitor and client column, the chief one being item 53, "'Instructions for Brief,' and also items 1, 34, 46, 71, 90 and 99.

"It seems to me that if a fee in the party and party column "was ample to cover the service rendered then there is no need "for a further fee in the solicitor and client column. That "would, in fact, be a kind of bonus which I cannot think was ever "intended. I have no doubt that an extra fee can be allowed "for 'Instructions for Brief' in the solicitor and client column, "but only in exceptional cases; for instance where evidence of "adultery is quite properly investigated but actually fails to "result in a charge, the decree being obtained on other grounds.

"It seems to me difficult to think of circumstances in which "an extra charge in the solicitor and client column could be

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"justified on an item for attending an appointment, but no doubt "each case must be judged on its own merits.

"In *Gibbs* v. *Gibbs* [1] Havers J. said: 'In my view the prin-"'ciple which the taxing master ought to adopt is as follows:—"'(i) Under the order for taxation it is, in my view, the duty of "'the taxing master to adopt as his normal standard the direction "'in Ord. 65, r. 27 (29). (ii) That at the same time he should "'make more generous allowances than he would on a taxation "'as between party and party. In making more generous "'allowances the taxing master, in my judgment, is permitted "'not only to allow items which can be properly included in a "'party and party taxation at a higher figure but also to allow "'additional items which would not be allowed on a taxation as "'between party and party. The taxing master has, of course, "'a very wide discretion.'

"In this case because of special circumstances the taxing "officer allowed a larger fee in an undefended cause in the party "and party column for 'Instructions for Brief' than is usual. "I do not think the nine guineas he allowed can be questioned. "I think it would have been possible for him, if he had considered "it a proper case owing to the fact that work was done which had "not been allowed for in the party and party column, to allow "something additional in the solicitor and client column. It "seems to me, however, that as the full value of the work done "has been allowed in the party and party column, there can be "no justification for an additional fee in the solicitor and client "column.

"The observation that Havers J. made was that a more "generous allowance should be made in a solicitor and client bill, "but in all the instances with which he was dealing the items "were properly allowable as the solicitor and client costs. There "was, in fact, no party and party bill in the case with which he "was dealing, and, therefore, the actual question at issue in this "case did not really arise before him. I see nothing in *Gibbs* v. "*Gibbs* [1] to suggest that a larger allowance than the full value "of the work done could be properly made. My conclusion is, "therefore, that the taxing officer took the correct view on the "objections to his taxation and that there is therefore nothing "to refer back to him."

The petitioner appealed to the Court of Appeal.

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[1] [1952] P. 332, 363.

Seuffert for the appellant. Neither the registrar nor the Commissioner applied the right principle, since this was a case of the taxation of costs as between solicitor and client. By R.S.C. Ord. 65, r. 27 (29): "On every taxation the taxing master shall "allow all such costs, charges and expenses as shall appear to "him to have been necessary or proper for the attainment of "justice or for the defending the rights of any party. . . ." In *Gibbs* v. *Gibbs* [2] it was held by Havers J. that in such a taxation as between solicitor and client the taxing master should adopt as his normal standard the direction contained in this rule, but that at the same time he should make more generous allowances than he would in a taxation as between party and party, and that in making more generous allowances the taxing master was permitted to allow items which could be properly included on a party and party taxation at a higher figure than that at which they were allowed on a party and party taxation. See also the recent decision of *Reed* v. *Gray*,[3] referred to in *Gibbs* v. *Gibbs*,[4] where Roxburgh J. discussed *Giles* v. *Randall*.[5] In my submission the registrar here disregarded the principle that a more generous allowance should be made on a taxation as between solicitor and client, than as between party and party, even where the costs are to be paid out of a common fund in which the client and others are interested. Mr. Eric Sachs K.C., at p. 136 of his book on Legal Aid, writes distinguishing solicitor and client costs from "party and party costs" and "solicitor and own client costs," and he continues: "The 'solicitor and client' basis referred to "in the Third Schedule of the Act is, however, a little less stern "than the 'party and party' basis—the total allowed being "normally about 15 per cent. higher where costs are taxed on "the footing that they are to be paid out of a common fund of "the above type. This results in part through additional items "being allowed, and in part through discretionary items, such "as instructions for brief and counsel's fees, being allowed at a "higher figure. It is to be noted that R.S.C. Ord. 65, r. 27 (29), "applies to taxations on a solicitor and client basis"; and in a note on p. 137 Mr. Sachs writes: "None of the existing modes" (of taxation) "really fits the needs of the legal aid scheme." I understand that since the decision in this case affects the legal aid fund the Law Society are interested in the case. A solicitor in legal aid cases only gets 85 per cent. of his profit costs.

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[2] [1952] P. 332.
[3] [1952] Ch. 337.
[4] [1952] P. 332.
[5] [1915] 1 K.B. 290.

SINGLETON L.J. Nothing in this appeal affects the rights of the petitioner. It affects the rights of the solicitors who have acted on her behalf. The application is that there should be paid out to them from the legal aid fund more than the registrar has allowed on his taxation of the bill of costs. The taxing master, whose decision is final as to amount, has said: "I have "allowed the full value of the work done; to allow more would "be to make the legal aid fund liable for a fee which has not "been earned." But Mr. Seuffert, on behalf of the appellant, submits that it is the duty of the taxing master, who has allowed the full amount of the value of the work done against the respondent, to allow more as against the legal aid fund. He supported that argument yesterday by saying that under the legal aid fund the solicitor only gets 85 per cent. of his profit costs, and therefore there ought to be paid to him this greater allowance and that there ought to be something more allowed on these particular items than the taxing master has allowed on the party and party taxation. I confess I find that argument difficult to follow. A solicitor who undertakes work under the Legal Aid and Advice Act, 1949, knows at least that he is safe for his costs; he has the legal aid fund behind him, and he knows, when he undertakes work under the Act, that he and all other solicitors who agree to work under the Act have agreed to accept 85 per cent. of the profit costs as prescribed by Sch. III to the Act. I do not think that it was intended by Parliament that a solicitor should be paid out of the legal aid fund for something which he has not done; but if it be the fact that the amounts which are allowed in these items against the respondent represent the full value of the work done, the decision of the taxing master must be right, since to allow more would make the legal aid fund liable for a fee which has not been earned. Yet it is submitted this court ought to make such an order which would have that result.

Paragraph 2 of Sch. III to the Act deals with the amounts payable to solicitors; and in paragraph 4 it is provided: "(1) Sub-"ject to the last foregoing paragraph, costs shall be taxed for "the purposes of this Schedule according to the ordinary rules "applicable on a taxation as between solicitor and client where "the costs are to be paid out of a common fund in which the "client and others are interested."

That provision has been considered by the courts on two occasions recently. The case of *Gibbs* v. *Gibbs* [6] was heard

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[6] [1952] P. 332.

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before Havers J., in March of this year, who referred to a most instructive passage in the book on Legal Aid by Mr. Sachs, which appears at pp. 136–9 of that work. Havers J. said[7]: "Counsel "was not able to cite any authority for the passage in Mr. Eric "Sachs' book which states that the result of the taxation was "normally about 15 per cent. higher where costs are taxed on the "footing that they are to be paid out of the common fund. I "myself am not aware of the precise way in which the different "modes of taxation are worked out and I prefer to express no "opinion about it. I read this objection to mean that the solicitor "is arguing that a taxation as between solicitor and client when "costs come out of a common fund is entitled to embrace a more "generous allowance than on a taxation as between party and "party, and that that generosity can extend, not only to increasing "the amounts of items, but also to allowing additional items "beyond those which would be allowed on a taxation as between "party and party. If so, leaving out for the moment the precise "percentage of increase, it seems to me to embody the true principle which I have been endeavouring to state. The registrar "made some observations. He says: 'My answer is applicable "'to all the objections. This is a solicitor and client bill and not "'a solicitor and own client bill. I can well understand the "'difficulty in which solicitors who undertake legal aid cases find "'themselves. They really, and perhaps not unreasonably, desire "'an indemnity as to costs, however incurred. My own view is "'that the legislature would have said so had they so intended. "'I understand that the solicitor is not allowed to recover any "'sum from the client and in some ways this seems a logical "'outcome of the proposal for legal aid. But it opens a door "'to the abuse of a privilege not so much by the solicitor as by "'the client. I should be very grateful for a ruling.'

"I quite agree with the registrar that this is a taxation as "between solicitor and client out of the common fund and not "a taxation as between solicitor and own client. However, the "registrar disallowed or reduced these 20 items and it seems "clear to me that he cannot have accepted the objection which "was put forward on behalf of the petitioner to which I have "already referred, namely, that there ought to be a more generous "allowance than on a taxation as between party and party. In "my opinion the proper inference which I ought to draw is that "the registrar declined to accept that basis of taxation, and it

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[7] [1952] P. 332, 364.

"seems to me to follow that he must have adopted a standard "of taxation which was less generous than that which the petitioner's solicitors were inviting him to adopt. If so, it seems "to me that he failed to apply the right principle, and, as his "answer applied to all the objections, it therefore vitiates all the "items disallowed which are affected by these objections."

Nothing of that kind applies in the circumstances of this case. The registrar has said: "I have already allowed the full value "of the work done in the costs on a party and party basis." I cannot help thinking that, when costs are ordered against an unsuccessful party, that party ought to pay the costs reasonably and properly incurred by the successful party in pursuance of his suit, and they ought to be so allowed on taxation. I have not heard any reason given why Item No. 53 in this case, a charge of 10 guineas plus five guineas, the first in the party and party column, and the second in the solicitor and client column, in respect of "Instructions for Brief," was made in that way. The registrar thought nine guineas plus the 50 per cent. allowance was enough for all the work done, and he thought that that ought to be allowed against the respondent. If the whole of the costs incurred can properly be charged against the opposite party who is ordered to pay costs, they ought to be, that is, they ought to fall upon him, and not upon the successful party or upon the legal aid fund.

Again let me take Item No. 71, to which I have referred already: "Dec. 6. Attending hearing of maintenance application "when order made for £2 per week"; 13s. 4d. in one column and 6s. 8d. in the other. We ought to assume that the registrar knows what it is proper to charge for that item. He said: "I "have allowed 13s. 4d., which is full value for the work done." Not a word is said to the contrary, but it is argued that because 13s. 4d. is the right charge on a party and party taxation, therefore on this form of taxation as between solicitor and client something ought to be added to it, that is, 6s. 8d. There is no basis for it in fact; if there had been it would have been pointed out to the registrar, and he would have dealt with it. It is not said, as far as I can see, that the registrar's views on amount are wrong. His statement is: "I have allowed the full value of "the work done."

That which is submitted to us as a point of principle is that because the registrar has allowed nine guineas against the unsuccessful party to the litigation on "Instructions for Brief," he ought to allow something over and above that amount against the client, which means for this purpose against the Law Society's fund. I know of no reason why he should do so, unless it is shown that there is some such charge which could properly be made. It is said that taxation as between solicitor and client is, and is intended to be, on a more generous basis than a taxation between party and party. That may well be so in some of the ways mentioned by Havers J. in *Gibbs* v. *Gibbs*,[8] but if the facts are that the full value of the service rendered is allowed against the unsuccessful party and recovered against him, it seems to me that any further charge allowed on the basis contended for by the appellant would be no more, and no less, than a bonus for work not done. One is faced by the finding that the full value for the work done has been allowed. If that be right (and it is not challenged), the application for something more appears to me to be an effort to obtain out of the legal aid fund something which has not been earned. To grant it would be, I think, against the public interest.

The registrar's observations show that he dealt with the case on its merits, and when the appeal was before the Commissioner he gave his judgment in the clearest possible terms. He was of opinion that the case of *Gibbs* v. *Gibbs*[8] did not go so far as to say that a larger allowance than the full value of the work done could properly be made, and that, as the full value of the work has been allowed on the party and party taxation, there could be no justification for an additional fee in the solicitor and client column on these items. This is a hopeless appeal; the findings of the registrar ought to have been accepted. In my view, the appeal should be dismissed.

I should add that the taxing master did allow some additional amounts on other items on the taxation as between solicitor and client, so that that which was allowed to the petitioner's solicitors was in fact higher than the allowance on the taxation as between party and party.

BIRKETT L.J. I am of the same opinion, and will only add a very few words. I should have been content not to add anything, were it not for the fact that we were informed by counsel that though this appeal is brought, of course, nominally in the name of the litigant, it has the approval of the Law Society. Having regard to the invaluable work which the Law Society has done with regard to the working of the Legal Aid and Advice Act,

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[8] [1952] P. 332, 363.

1949, to which Lord Jowitt, when Lord Chancellor, paid very great tribute at the time, I think perhaps it would not be respectful for me merely to say " I agree."

I realize how important this point at first sight seems, because it is said, as I gather, a decision upon this matter affects similar cases which may come before the courts in the future all over the country. I do not take that view, since I am dealing with the precise facts of this case and with no other. I agree most fully with what my Lord has said, that this case is covered by the findings of the registrar which have already been read. The substance of those findings was that the nine guineas allowed in the party and party column represented the full value of the work done. He added: " I accordingly decline to allow any " further sum in the solicitor and client column; to do so would " make the legal aid fund liable for a fee which has not been " earned." The argument, as I understood it, was that despite the fact that the registrar said, " I have allowed the full amount " in the party and party column, which is the full value of the " work done," nevertheless he ought to have added some amount to make a more generous allowance when dealing with the solicitor and client column.

With regard to the reliance placed upon *Gibbs* v. *Gibbs*,[9] and, indeed, upon *Reed* v. *Gray*,[10] which was referred to in the elaborate judgment of Havers J. in which the whole matter was reviewed, I think the pith is where the judge said[11]: " In my " view, the principle which the taxing master ought to adopt is " as follows: (i) Under the order for taxation it is, in my view, " the duty of the taxing master on a taxation to adopt as his " normal standard the direction in Ord. 65, r. 27 (29). (ii) That " at the same time he should make more generous allowances " than he would on a taxation as between party and party. In " making more generous allowances the taxing master, in my " judgment, is permitted not only to allow items which can be " properly included in a party and party taxation at a higher " figure but also to allow additional items which would not be " allowed on a taxation as between party and party. The taxing " master has, of course, a very wide discretion."

The way in which I interpret these words is that the distinction between a taxation on the party and party basis and on the solicitor and client basis seems to me to be that the taxing master, in his discretion, having the facts of the whole matter before him, can say: "There are certain items which I do not think it "proper to include in the party and party taxation, but which I "think it proper to include in a solicitor and client taxation; and, "secondly, there are certain items on which I have allowed a "certain amount in the party and party column on which I think "in my discretion I could be more generous on the solicitor and "client basis." I cannot think that that rule has any application to the precise facts in this case with which we are dealing, because, as I understand it, there is simply no margin for the exercise of the grant of an additional more generous allowance when the taxing master has said in terms: "I have allowed "everything that has been earned." As the Commissioner said in his judgment: "It seems to me that if a fee in the party and "party column was ample to cover the service rendered, then "there is no need for a further fee in the solicitor and client "column. That would, in fact, be a kind of bonus which I "cannot think was ever intended. I have no doubt that an extra "fee can be allowed for 'Instructions for Brief' in the solicitor "and client column, but only in exceptional cases; for instance "where evidence of adultery is quite properly investigated but "actually fails to result in a charge, the decree being obtained on "other grounds."

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[9] [1952] P. 332.

[10] [1952] Ch. 337.

[11] [1952] P. 332, 363.

I cannot think that in this case, applying the words of Havers J., that there were items which the registrar ought to have allowed in the solicitor and client column which were not allowed in the party and party column, or that there were any grounds, when his express finding is considered, for making a more generous allowance in the solicitor and client column than was made in the party and party column.

I confine myself to the precise facts in this case, and it does not seem to me to be right that where a taxing master, exercising his discretion, says, "I have allowed everything that was earned; "I have given the full value of what was done" in the party and party column, nevertheless should continue, "I must award "in the solicitor and client column a sum which has not been "earned," for that would mean that these further allowances, though coming out of the legal aid fund, would take upon themselves the character which the Commissioner gave to them, that is, of being a bonus. Therefore, it seems to me that the Commissioner was right when he said that he could see nothing

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in *Gibbs* v. *Gibbs*[12] to suggest that a larger allowance than the full value of the work done should be properly made, and I agree with what Havers J. said that when you are taxing a bill of costs it may be there are items you could put in that column which are not in the party and party column; it may be that there are items with regard to which you can be more generous in that column than you could on a party and party basis. But where a taxing master has said, "There is nothing that I can put in "the solicitor and client column because I have already awarded "the full value of all the work done" in the party and party column, then I do not think the principle stated in *Gibbs* v. *Gibbs*[12] of making a more generous allowance in the solicitor and client column applies.

For these reasons I agree with the judgment of my Lord that this appeal ought to be dismissed.

MORRIS L.J. I am in full agreement with the judgments which my Lords have given. In my view, the findings of the registrar are decisions of fact which, together with his decisions on matters of quantum, conclude this matter. It seems to me that where a taxing master has allowed the maximum in the sense of the full value of all the work done by a solicitor in regard to an item, and has held that all the work done in regard to such item is properly referable to a party and party basis, that then in such a case there is no room for considering anything in the nature of a more generous allowance on a solicitor and client basis.

Appeal dismissed; order for taxation of the appellant's costs as between solicitor and client according to Sch. III of the Legal Aid and Advice Act, 1949.

Solicitors: *Gregory Rowcliffe & Co., for Patterson, Glenton & Stracey, Newcastle-upon-Tyne.*

C. G. M.

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[12] [1952] P. 332.

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1952
Nov. 14.

Barnard J.

Husband and wife—Legal aid—Security for costs—Husband an assisted person—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 12 (2) (*b*)—*Matrimonial Causes Rules,* 1950 (*S.I.* 1950, No. 1940 (*L.* 27)), *r.* 65 (3).

In the Divorce Division a wife has a right to apply for security for her costs; and she is entitled to do so without proof of special circumstances although her husband is an assisted person.

Williams v. *Williams* (*Ward intervening*) [1929] P. 114 applied; *Conway* v. *George Wimpey & Co. Ld.* [1951] W.N. 27; [1951] 1 T.L.R. 215 distinguished.

Summons (adjourned into court for judgment).

The parties were married in 1943, and the husband left the wife in January, 1948. In February, 1948, the wife obtained an order for maintenance in a court of summary jurisdiction sitting at Southampton on the ground that she had been deserted. On April 23, 1951, the husband filed a petition for divorce in the Leeds district registry on the ground of desertion. On May 25, 1951, the wife obtained a civil aid certificate to defend the petition, and on May 30, 1951, her answer was filed denying the alleged desertion. In January, 1952, the husband was granted a civil aid certificate. In March, 1952, the wife's certificate was discharged, but on July 22, 1952, she was granted a further civil aid certificate limited to obtaining an order for security for costs against the husband. The district registrar at Leeds summarily dismissed the application, without in any way complying with rule 65 (3) of the Matrimonial Causes Rules, 1950,[1] and the court was informed at the hearing of the appeal against this dismissal that the registrar felt himself precluded from complying with the rule by reason of a registrar's direction dated January 29, 1951, with an addendum dated October 4, 1951. The direction reads: "Legal Aid, Costs,

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[1] Matrimonial Causes Rules, 1950, r. 65 (3): "Where an application for "security has been made under this "rule, a registrar shall ascertain "what is a sufficient sum of money "to cover the costs of the wife, and "if, after taking all the circum-"stances into account, including the "means of the husband and the wife, "he considers that the husband "should provide security for all or "some of the wife's costs, he may "order the husband to pay the sum "so ascertained, or some portion of "it, into court or to give security "therefor within such time as he "may fix, and may direct a stay of "the proceedings until the order is "complied with."

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"Security for—In the absence of any regulations under section 12 "of the Legal Aid and Advice Act, 1949, the decision in *Conway* "v. *George Wimpey & Co. Ld.*[2] must be taken to prevent the "making of any order for security for costs against an assisted "person unless there are special circumstances. The fact that a "legally aided husband has been directed by the local committee "to pay a contribution less than the maximum contribution may "be regarded as a special circumstance, and an order to secure "for the wife's costs a sum not greater than the difference "between the actual and maximum contributions may be made "in a proper case."

Alan Trapnell for the wife.
Norman Black for the husband.

Cur. adv. vult.

BARNARD J., reading his judgment, stated the facts, read the registrar's direction, and continued:—The registrar's direction, as is stated therein, is based on the decision of the Court of Appeal in *Conway* v. *George Wimpey & Co. Ld.*[3] In that case the order for security for costs was made against the plaintiff who was appealing to the Court of Appeal, but ten days later the appellant obtained an emergency certificate under the Legal Aid and Advice Act, 1949, and became an assisted person. In these circumstances the Court of Appeal discharged the order for security, and in the course of his judgment Cohen L.J. stated[4]: "I think we must proceed on the basis that, generally speaking, "and in the absence of special circumstances, it would be "inappropriate to make an order for security for costs at a time "when an emergency certificate is in force. In those circumstances I think it is inappropriate that the order for security "should stand. For these reasons I think that in the present "case, there being no special circumstances to which our attention has been directed, we should discharge the order made by "the court on November 6." The security ordered in that case was in respect of an appeal to the Court of Appeal and was applied for under R.S.C., Ord. 58, r. 15 (2), which reads as follows: "The Court of Appeal may in special circumstances order that "such security shall be given for the costs of the appeal as the "court may direct."

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[2] [1951] W.N. 27; [1951] 1 T.L.R. 215.

[3] [1951] W.N. 27; [1951] 1 T.L.R. 215.

[4] [1951] 1 T.L.R. 215, 216.

In a later case before the Court of Appeal, *Jackson* v. *John Dickinson & Co. (Bolton) Ld.*,[5] it was held that a plaintiff, who was resident abroad, could be ordered to find security for costs, notwithstanding the fact that he was an assisted person, and the Court of Appeal distinguished that case from *Conway* v. *George Wimpey & Co. Ld.*[6] Somervell L.J., in the course of his judgment, said[7]: "In *Conway's* case[8] Cohen L.J. was careful to "make it clear that he was not seeking to lay down a general "rule covering all classes of case and all circumstances."

The registry, by their direction, have interpreted the decision in *Conway's* case[8] as applying to a wife's application for security for costs in the Divorce Division. I have come to the conclusion that this direction is a misinterpretation of the decision in *Conway's* case.[8] It is a well established practice of this Division that a wife has a right to apply for security for her costs, and Lord Merrivale P. once said in *S.* v. *S. and P.*[9] that "there is "something of the nature of a prescriptive right, upon cause "shown, to secure to the wife the means of defence"; and Hill J., in *Williams* v. *Williams (Ward intervening)*,[10] dealt in the course of his judgment with the object of security, and I cannot do better than repeat his words[11]: "The main object of "security, in recent years at any rate, is that justice may be "done by the wife being enabled to procure the assistance of "solicitor and counsel and come to court. That is the main "object in modern times. The old basis for the rule, namely, "that all the wife's property on marriage passes to the husband, "and therefore the husband alone can foot the bill, has gone "altogether, and now you must consider whether in the circumstances the wife can foot the bill, and it is a very important "matter to consider whether the solicitor can conduct the "business without something in court to pay him up to setting "down and without security."

I think that the present case is a different class of case from that of *Conway* v. *George Wimpey & Co. Ld.*[12] by reason of the peculiar nature of a wife's security for costs in the Divorce Division, which I have already indicated, and is not covered by *Conway's* case.[12]

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[5] [1952] W.N. 9; [1952] 1 All E.R. 104.

[6] [1951] W.N. 27; [1951] 1 T.L.R. 215.

[7] [1952] 1 All E.R. 104, 106.

[8] [1951] W.N. 27; [1951] 1 T.L.R. 215.

[9] (1927) 44 T.L.R. 52, 53.

[10] [1929] P. 114.

[11] Ibid. 118.

[12] [1951] W.N 27; [1951] 1 T.L.R. 215.

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I therefore allow this appeal and refer the matter back to the registrar at Leeds to comply with rule 65 (3) of the Matrimonial Causes Rules, 1950. The registrar will, of course, take into account the fact that the husband is an assisted person and will also have regard to the facts stated in the civil aid certificate and it may well be that he will come to the conclusion that this is a case in which no security should be ordered.

Case referred back to registrar.

Solicitors: *White & Leonard, for Geoffrey Wells & Woodford, Southampton; Church, Adams & Co., for Day & Yewdall, Leeds.*

J. B. G.

1952
Oct. 14.

Lord Merriman P. and Davies J.

ENGLAND *v.* ENGLAND.

Husband and Wife—Adultery—Evidence of inclination and opportunity —Allegation denied—No irrebuttable presumption of adultery.

Evidence which is abundantly sufficient to establish adultery does not raise an irrebuttable presumption, nor estop the parties charged from giving evidence to the contrary nor lead in law to the conclusion that they must be "deemed" to have committed adultery notwithstanding that evidence.

A man spent the night in the room of a married woman in whose favour there existed an order of justices for maintenance. It was admitted that they were attracted to each other, that they had planned to get married if their respective spouses should divorce them, and that for some months before the night in question, the man had been a constant visitor to the wife's room, often in the late evening. On an application by the married woman's husband to discharge the order the justices held that adultery had not been committed, accepting the evidence that the man had spent the night in a chair to look after the wife when she was ill and that although the possibility of adultery had on occasions been discussed between them they had agreed that there should be no sexual intercourse until they could marry:—

Held, on appeal, that the court was not obliged to decide, in a contested case, that adultery had been committed contrary to its own belief; and that there was no reason to differ from the view of the justices who had plainly understood the very strong nature of the evidence but had nevertheless believed the two people accused.

Woolf v. *Woolf* [1931] P. 134 distinguished.

APPEAL from justices for the petty sessional division of Gore.

In July, 1946, a wife was granted an order for maintenance on the ground of desertion. In August, 1951, the wife met one

George Morecroft, a married man separated from his wife. The wife and Morecroft planned to get married as soon as their existing marriages were dissolved; but they agreed not to have sexual intercourse until they were married. They met frequently, and Morecroft visited the wife's room in a lodging house on several occasions, often staying till late at night. On April 20, 1952, Morecroft admittedly spent the night in the wife's room and was seen to leave it the following morning by both the husband and the landlord. The husband applied to the justices for the order to be discharged on the ground of adultery; but the justices by a majority accepted the denial of adultery and dismissed the application on June 11, 1952. The husband appealed.

The justices in their reasons said: "(1) This is a case in "which the facts are not in the main in dispute: the conflict "lies in the interpretation to be placed on the facts.

"(2) England's case is that on the night of April 20, 1952, "Morecroft, a married man separated from his wife, spent the "night in Mrs. England's room and that adultery was com-"mitted on that occasion. Further that on April 6, 1952, More-"croft called to see Mrs. England about midday and was not seen "to leave her room until the afternoon of the following day. "England called evidence to show that there was close associa-"tion between his wife and Morecroft and that over a period "of some months Morecroft had been a constant visitor, often "late at night.

"(3) Mrs England's case is that she met Morecroft whilst "on holiday in August last year (1951); that they became "attracted to one another, and planned to get married as soon "as both could become divorced from their respective spouses. "She admitted that from November last year until leaving [her "lodging] at the end of May this year, Morecroft had been a "constant visitor—often at late hours on account of his work "as a bus driver and that he had nearly every meal with her.

"She stated that the only occasion when Morecroft had "spent the night in her room was on April 20, 1952. On that "day she was really ill. Morecroft had called about 10.30 p.m. "and had spent the night in a chair in her room to look after "her.

"She admitted that the possibility of committing adultery "had been discussed on occasions but that they had agreed "there should be no sexual intercourse until they could marry.

"She denied that she had ever committed adultery with Morecroft.

"(4) We find:—(a) That although Mrs. England and Morecroft were exceedingly indiscreet on April 20, 1952, in that they spent the night together, they did not commit adultery. (b) That with regard to the allegation that Mrs. England and Morecroft spent the night of April 6, 1952, together, that there is a doubt raised by the evidence on this point and that the benefit of this doubt must be given to Mrs. England. (c) That the demeanour of both Mrs. England and her witness was open and truthful, and when they said they had agreed not to have sexual intercourse until married to each other we believed them.

"(5) For the above reasons we a majority of justices dismiss Mr. England's application to discharge the order. We record that our dissenting colleague considered that there was ample evidence to support a conclusion of adultery."

S. Seuffert for the husband: Where there are circumstances such as those proved and admitted in the present case the court is bound to infer from the admitted combination of inclination and opportunity that adultery has been committed, and the parties are estopped by their conduct from denying it. (He referred to *Woolf* v. *Woolf*.[1])

Ellison Rich for the wife.

LORD MERRIMAN: This is a husband's appeal from the dismissal by the justices for the Gore petty sessional division of Middlesex, sitting at Hendon, of his summons claiming the discharge of an order made against him on July 31, 1946, on the ground of desertion, to pay his wife £1 15s. a week. The application, which was alternatively to vary or discharge, but in substance was one to discharge, the order, was based on section 7 of the Summary Jurisdiction (Married Women) Act, 1895, the last sentence of which reads, so far as the material words are concerned:—"If any married woman upon whose application an order shall have been made under this Act . . . shall commit an act of adultery, such order shall upon proof thereof be discharged."

It is said that it was proved that this wife had committed an act of adultery, and that the finding of the justices that she had not could not stand. The case was given a very careful hearing.

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[1] [1931] P. 134.

[His Lordship then stated the facts and continued:] I approach this case not only with regard to the facts of the night of April 20, 1952, but adding to them the admission, about which there was no doubt at all, that they were frequently in each other's company in the house. In other words, it is a case in which the evidence that they were alone together in that room throughout the whole of that night is only an example, albeit a very strong example, of a combination of inclination and opportunity which manifestly existed on many other occasions.

The justices found by a majority (a fact which is irrelevant, in my opinion, if it ought to have been disclosed at all) that although the wife and this man were exceedingly indiscreet on April 20, 1952, in that they spent the night together, they did not commit adultery. They then dealt with the allegation concerning April 6, 1952, which I need not pursue any further, because the argument about it was not pursued (and it really adds nothing to the matter one way or the other, because, as I have already said, apart from April 6, 1952, there was ample evidence of other opportunities had the parties been minded to commit adultery). The justices say further that "the "demeanour of both Mrs. England and her witness" (that is, the alleged paramour) "was open and truthful, and when they "said that they had agreed not to have sexual intercourse until "married to each other we believed them. For the above "reasons we a majority of justices dismiss Mr. England's ap-"plication to discharge the order. We record that our dissenting "colleague considered that there was ample evidence to support "a conclusion of adultery."

I will come back to that finding in a moment. But this case was argued not on the indisputable proposition that, uncontradicted, there was ample evidence to support a conclusion of adultery, but on the basis that it could not be contradicted; that the admitted fact that these people were in that room alone together during the night of April 20, 1952, coupled with the admitted fact that they were attracted by each other, as the justices found, raised what was at one moment called an irrebuttable presumption that they had committed adultery. Alternatively it was put that they were estopped from giving evidence that they had not committed adultery, or that they must be deemed within the section (which does not say anything about "deeming" at all) to have committed an act of adultery, and, therefore, that this decision cannot stand.

The argument was based upon the decision of the Court of Appeal in *Woolf* v. *Woolf*,[2] and it is no doubt the fact that there are some isolated passages, particularly in the judgment of Lord Hanworth M.R., which support the view that from the evidence adduced about the events of the night of April 20, 1952, "adultery," to use one phrase which occurs,[3] "must be "inferred." But in my opinion it is vital to bear in mind what were the circumstances of that case. It was a decision of Lord Merrivale P. at a time when the class of undefended divorce suit which depended upon evidence of a single night at an hotel with a woman unknown was very prevalent. No doubt my predecessor expressed himself very strongly about the unsatisfactory nature of that class of case, but it is right to say that one has only to look back at some of the older reports to see that opinions of the same kind were to be found in earlier cases. The point which was attracting attention, both before and after that time, was not only whether adultery had or had not been committed (I am speaking generally) but whether the circumstances in which it was put forward suggested that the suit itself was tainted by either collusion or connivance; and if one looks back at books 100 years old it will be seen that that was the sort of issue which was troubling the judges of that day in that connexion.

The significant facts about *Woolf* v. *Woolf*[4] were that the President had expressed himself as not being in any doubt on that matter, but as completely satisfied of the good faith of the petitioner; therefore no sort of question of collusion or connivance in connexion with that particular visit of the husband to the hotel arose at all; moreover, at an earlier stage of the case, as appears from the report,[5] Hill J. had directed inquiries by the King's Proctor because the woman was unnamed. Nothing was found on those inquiries. The King's Proctor reported that he was unable to throw any further light on the matter, and it was after the inquiries that Lord Merrivale P. said[6] that he saw no reason whatever to assume that the petitioner had not acted in good faith. He was inclined to hold that adultery had not been committed, and suggested that in the absence of knowing who the woman was—for the husband had been resolute in declining to give her name—some relative of the husband might have been masquerading, so to speak, as the paramour, so that the husband could obtain the divorce he was anxious to obtain.

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[2] [1931] P. 134.
[3] Ibid. 144.
[4] [1931] P. 134.
[5] Ibid. 135, 136, 141–2.
[6] Ibid. 143.

It was with reference to circumstances such as those that the Court of Appeal expressed themselves, and Romer L.J., after saying that the husband refused to disclose the woman's name, says [7]: "What possible difference it would have made had the "name been disclosed I am at a loss to see; because the only "thing that the court would have been able to discover from a "disclosure of the name would have been that the lady was "not, as the learned President suggests she might possibly "have been, some near relative of the respondent. In my "opinion, that possibility can be entirely ruled out; it is incredible, in the circumstances, that the lady was an aunt or "a sister or any like near relation of the respondent"; and in the absence of any defence, and any attempt to impose a fraud on the court being expressly ruled out, the Court of Appeal said that the inference of adultery ought to have been drawn. That seems to me to be a very different thing from saying that where a case is hotly contested parties who deny that they have committed adultery on that, or on any other occasion, are not allowed to be heard to say so, that they are estopped from denying adultery, that the presumption is irrebuttable, that their evidence to the contrary is not to be listened to, in spite of the fact that in one sense, on their own admission, their evidence, if believed, deprives both of them of the possibility that their respective spouses might make use of the circumstances to obtain divorces, which would enable them to bring their hopes of marriage to fruition.

I decline to hold that there is any rule of law that the conjunction of strong inclination with evidence of opportunity (and the same facts may be evidence of both) leads to an irrebuttable presumption that adultery has been committed. That it affords very strong prima facie evidence is indisputable, but that is quite another thing. I am rather reluctant to drag in my own experience as a judge, and particularly as nobody has been able to cite any reported case, but I should say from my own recollection that I have known several cases in the course of my time in this court where there has been a very hot contest, although the circumstantial evidence from which an inference of adultery has

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[7] [1931] P. 134, 146.

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been sought to be drawn has been very strong, indeed, at least as strong as in this case, in which one has, nevertheless, been persuaded that the oath of the parties denying adultery was ever committed was to be accepted. I cannot believe that there is any law which obliges a court to decide in a contested case, where there is very strong prima facie evidence on the one side, and, maybe, strong circumstantial evidence supporting a denial on the other side, that adultery has been committed contrary to its own belief. I put to counsel, by way of testing how far this proposition went, the question whether, if a denial in the same terms as in this case was supported by the circumstantial evidence, supposing the alleged paramour to be a woman, that she was proved to be virgo intacta by medical evidence which really left no doubt, it could still be said that the fact that they had spent a night alone in a room was not susceptible of an innocent explanation.

We were referred to the decision of the Court of Appeal in *Gower* v. *Gower*.[8] I am not going to discuss the question of the burden of proof, for that, I think, has already been disposed of by the House of Lords in *Preston-Jones* v. *Preston-Jones*.[9] It is not very easy from this report to follow exactly what happened, but an issue had been directed whether misconduct had or had not been committed. That issue was tried by Barnard J., who found that it had not. I will read the opening sentences of Bucknill L.J.'s judgment [10]:—"The learned judge came to the "conclusion that adultery was not made out, mainly on the "ground that there was not a scrap of evidence of any inclina- "tion. I venture to think that the learned judge has misdirected "himself there. The vital question is: Where were these people "sleeping during the time that they were together? If the "evidence points almost irresistibly to the fact that they were "sleeping in the same room, one does not want any further "evidence than that." I pause there. If I may put my own paraphrase, that is simply saying, as has been said over and over again in this court, that the very same facts may be evidence both of the inclination and of the opportunity. Then the Lord Justice went on:—"There is no need for evidence of kissing and "that sort of thing. I ask myself this question:—If Mr. —— "and the wife had not been called as witnesses, would there have "been the slightest doubt on the evidence that adultery had been

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[8] [1950] W.N. 156; [1950] 1 All E.R. 804.

[9] [1951] A.C. 391.

[10] [1950] 1 All E.R. 804, 805.

"committed?" Then he posed the question slightly differently, but, as I venture to suggest, more accurately: "Would not the "evidence have been abundantly sufficient to establish adultery? "I should have thought there could be no doubt about that." He continued: "Did these two witnesses remove that presump-"tion?" That is not saying that there was an irrebuttable presumption. It is saying exactly the opposite. It is saying that that class of evidence affords very strong prima facie evidence, but that it is rebuttable. Bucknill L.J. then discussed whether it was, in fact, rebutted, and, without going into details, he pointed to some letter which showed that the wife in that case was not a truthful witness, and observed that the judge had said that she was a very unsatisfactory witness, and Bucknill L.J. added that "the man was tarred with the same brush." So that it was not a case of demeanour. In other words, it came within the third proposition in Lord Thankerton's opinion in the case of *Thomas* v. *Thomas*[11]:—"The appellate court, either "because the reasons given by the trial judge are not satisfac-"tory, or because it unmistakably so appears from the evidence, "may be satisfied that he has not taken proper advantage of his "having seen and heard the witnesses"; and there was also the suggestion that there had been misdirection on the point that there was no evidence of inclination.

But my view is that that judgment does not support the proposition either that the evidence, which is abundantly sufficient to establish adultery, raises an irrebuttable presumption or estops the parties charged from giving evidence to the contrary, or leads in law to the conclusion that they must be "deemed," notwithstanding evidence to the contrary, to have committed adultery.

I see no reason for differing from the view of justices who plainly understood the very strong nature of the evidence they had been given, but who nevertheless believed the two people concerned on their oath that adultery had not been committed at all, and in particular had not been committed in the circumstances which prevailed on the night of April 20, 1952.

In my opinion this appeal fails.

DAVIES J. In this case the justices have found (indeed, it was not disputed by the wife or the man Morecroft, with whom she was charged with having committed adultery) that from about November, 1951, the wife and Morecroft became attracted to each other, that he was a constant visitor to the room where she lived, frequently late at night, and that on one occasion at least (the other being in dispute, and not found by the justices to have occurred) he spent the night in her room, arriving there somewhere about 10.30 p.m. and leaving early in the morning. Not to put too fine a point upon it, they were in love with each other. Obviously there was evidence of an inclination to commit adultery; for they did not dispute, and the justices found, that they had discussed that subject; but they decided that they would not have sexual intercourse unless and until they could get married, which they were both anxious to do.

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[11] [1947] A.C. 484, 488.

If the evidence stopped there, it is plain, to use one phrase that occurs in the justices' reasons, that there was ample evidence to support a conclusion of adultery. Indeed, if the evidence stopped there, it might well be said that the case fell within the passage, that was so much pressed upon this court, from the judgment of Lord Hanworth M.R. in *Woolf* v. *Woolf*[12]: "Human nature being what it is, adultery must be inferred "here." But the evidence did not stop there. Both the wife and the alleged paramour went into the witness-box and they swore on oath that they had not committed adultery either on that night or on any other occasion. They supported that by reasons, and the justices believed them. This court is now, as I understand it, asked to say that the justices had no right to believe them, that on the facts of this case and upon some suggested principle, whether it is called estoppel, irrebuttable presumption, assumed adultery, constructive adultery, or what, I know not, any court must infer the commission of adultery despite the sworn testimony of the accused persons to the contrary. I know of no such principle. In my judgment there is no such principle.

Woolf v. *Woolf*,[13] as my Lord has pointed out, dealt with an entirely different set of facts. It was a case where the evidence was all one way and was wholly uncontradicted. The question there was whether, in that state of the evidence, there was such a prima facie case that the court was bound to act upon it. This case, a defended case, where the evidence was contradicted, is in my opinion wholly different.

The second way in which this case was put by Mr. Seuffert, who never shrank from the propositions which he advanced to this court, however startling they might appear to be, was that the position of a wife who has obtained an order for maintenance on the ground of desertion, and knows, as I suppose she must be deemed to know, of the provisions of section 7 of the Summary Jurisdiction (Married Women) Act, 1895, is that even if she has not actually committed adultery she must not do anything which might entitle a court to make a finding of adultery against her; if she does do any such thing, then her order must be discharged. If that is the second proposition, there is, of course, no authority for it.

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[12] [1931] P. 134, 144.

[13] [1931] P. 134.

Finally, if we are asked to substitute our own view (and I indicate no sort of view at all of my own on this evidence), for that of the justices, in my judgment this is clearly not a case in which an appellate court could take upon itself the burden of doing any such thing. There is plainly here no misdirection of themselves by the justices. There is plainly nothing unsatisfactory in the reasons which they have given, as my Lord has already indicated. And it is admitted by counsel for the appellant that he is unable to point to a single factor in this case, a single thing in the evidence, as to which it could be said, as in some of the authorities at which we have been invited to look, that either of the persons accused of adultery has given unsatisfactory or false evidence in some other, even collateral, matter, so that it could be said that the witness was an unsatisfactory witness, and that therefore this court should substitute its own view, whatever that might be, for that of the justices who heard the evidence of these people and believed them.

In my judgment this is a case in which it is impossible for this court to do any such thing. For these reasons I agree with my Lord that this appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: *Ferris, Roberts, Thomas & Reed; Pratt & Wegg-Prosser.*

J. B. G.

1952
Oct. 15.

Lord Merriman P., Davies J.

COOPER *v.* COOPER.

Husband and Wife—Justices—Conflict with jurisdiction of High Court—Wilful neglect to maintain—Existence of decree of judicial separation—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190 (4)—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 20 (2).

It is not the mere possibility that identical issues might arise in the High Court and in a court of summary jurisdiction that gives rise to a conflict of jurisdiction, but the identity of the actual issues.

Where, therefore, a wife, who had been granted a decree of judicial separation, applied for and obtained the dismissal of her application for permanent alimony, and afterwards issued a summons for maintenance in a court of summary jurisdiction on the ground of her husband's wilful neglect to maintain her:—

Held, that there was no conflict of jurisdiction once her application in the High Court had been dismissed, and the mere possibility of her making a future application in the High Court for permanent alimony, or for maintenance on the ground of wilful neglect to maintain, did not prevent the justices from making an order in her favour.

Quaere, whether the provision in rule 45 of the Matrimonial Causes Rules, 1950, that an application for permanent alimony might be made at any time after the decree was intra vires in view of the introduction of the words "on any decree" in the relevant section (section 20 (2)) of the consolidating Matrimonial Causes Act, 1950.

Pooley v. *Pooley* [1952] P. 65 applied.

APPEAL from the justices for the parts of Lindsey in the county of Lincoln, sitting in the matrimonial court of the petty sessional division of Grimsby County.

The parties were married in 1931, and in January, 1945, the wife filed, in the Grimsby district registry, a petition for judicial separation on the ground of her husband's adultery. In October, 1946, she was granted a decree, and on November 15, 1947, she applied in the Grimsby district registry for permanent alimony. That application was adjourned sine die in January, 1948, and in April, 1948, a deed was entered into whereby the husband agreed to pay her a sum which would amount to £4 10s. a week after deduction of tax. The proceedings for permanent alimony were stayed. By the end of 1950 the husband was in arrears of his payments under the deed, and the wife was unsuccessful in her efforts to enforce the deed. In June, 1951, she took out a summons in a court of summary jurisdiction on the ground of wilful neglect to provide reasonable maintenance; but her advisers at the time did not dispose of the application for permanent alimony, owing to an error in procedure, and the summons was dismissed in August, 1951.

On January 16, 1952, on the wife's application by summons dated December 10, 1951, the district registrar dismissed the application for permanent alimony. On January 21, 1952, the wife took out a further summons under the Summary Jurisdiction Acts on the ground of wilful neglect to provide reasonable maintenance. Her summons was dismissed on February 22, 1952.

The justices gave the following reasons for their decision: "In 1945, the appellant had two courses open to her. She "could have taken out a summons under the Summary Juris"diction (Married Women) Act, 1895, or she could commence "proceedings in the High Court. She elected to adopt the "latter alternative and did in fact obtain an order in the High "Court with all the rights and remedies attaching thereto— "the most important right so far as this matter is concerned "being her right to make application for permanent alimony; "and this right was exercised by summons in 1947 and remained "on the file until it was dismissed upon the application of the "appellant—and during which time there would appear to be "abundant authority for saying that the High Court was seised "of the matter (*Higgs* v. *Higgs* [1]).

"The appellant's solicitors contended:—

"1. That the husband was endeavouring to evade his respon"sibilities when he was well able to maintain his wife.

"2. That on and after December 10, 1951 [the date of the "summons to dismiss the alimony application] all proceedings "in the High Court were at an end and that an election was "again open to the appellant.

"Whereas the justices sympathized with the appellant, they "felt that they could not consider the matter in the light of "the first contention.

"So far as the second contention was concerned, in the "absence of any cited authorities they came to the conclusion "that in their view when the appellant elected to proceed in "the High Court and obtained an order for judicial separation "in that court the High Court became seised and remained "seised of the matter, despite the appellant's efforts to put an "end to such jurisdiction, for the order obtained in the High

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[1] [1935] P. 28.

"Court is still in existence and the rights accruing to the "appellant under the Matrimonial Causes Rules, 1950, r. 45, "are still open to her at any time.

"If the lower court is deemed to have jurisdiction then "there would appear to exist a concurrent jurisdiction which "would produce a parallel situation as that deprecated by "Avory J. in *Rex* v. *Middlesex Justices; Ex parte Bond* [2] and "referred to with approval by Lord Merriman P. and Langton J. "in *Higgs* v. *Higgs* [3] and by Barnard J. in *Kilford* v. *Kilford*.[4]

"The justices felt fortified in their view of the matter by "what Lord Merriman P. said in the course of his judgment "in *Kirk* v. *Kirk* [5]: 'Assuming that the justices, in their dis-"'cretion, had jurisdiction to keep the order alive, manifestly "'one of the matters which would guide them—in this court—"'in considering whether or not to keep the order alive, not-"'withstanding the decree of divorce, would be whether the "'wife had any *alternative* rights in Scotland, where she had "'obtained her decree,' and referred to by Barnard J. in "*Kilford* v. *Kilford*.[4]"

D. H. Robson for the wife, in addition to submitting that there was no conflict of jurisdiction once the application for alimony in the High Court had been dismissed, submitted that the effect of an alteration in the wording of the relevant section would probably prevent the wife from applying again for permanent alimony in the High Court, notwithstanding the provisions of rule 45 of the Matrimonial Causes Rules, 1950, for the words "on any decree . . ." had been introduced into the Matrimonial Causes Act, 1950.[6]

Bernard Gillis for the husband.

LORD MERRIMAN P. This is a wife's appeal against the dismissal by the justices for the Parts of Lindsey, in the county of Lincoln, sitting at Grimsby on February 22, 1952, of her summons for wilful neglect to provide reasonable maintenance. The justices have dismissed the summons, as the reasons with which they have provided us show, on a point of jurisdiction. They held, in effect, that they had no jurisdiction to decide the case, though I am willing to assume that in using those words they meant that they should stay their hands so as to avoid a supposed conflict of jurisdiction with the High Court. I make that qualification because it is very important to bear in mind that Parliament has invested courts of summary jurisdiction with powers in matrimonial disputes which in many respects are identical with those possessed by the High Court. The most that this court, or, as far as I know, any court, has said, while recognizing the co-existence of two jurisdictions, is that if there is conflict between them the court of summary jurisdiction should hold its hand, at any rate until the risk of conflict is past.

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[2] [1933] 1 K.B. 72, 80.

[3] [1935] P. 28.

[4] [1947] P. 100.

[5] [1947] W.N. 161; 63 T.L.R. 422.

[6] Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (4): "Where any decree for restitution of "conjugal rights or judicial separa-"tion is made on the application of "the wife, the court may make such "order for alimony as the court "thinks just."

Matrimonial Causes Act, 1950, s. 20 (2): "On any decree for judicial "separation, the court may make "such order for the payment of "alimony to the wife as the court "thinks just."

Matrimonial Causes Rules, 1950, r. 45: "An application for permanent "alimony may be made at any time "after a decree for judicial separa-"tion or for restitution of conjugal "rights, as the case may be, has been "pronounced."

The wife's case here is that there is no conflict at all. The material facts are as follows: [His Lordship stated the facts, observing that if the wife had gone to the bench of justices from whom this appeal had been made, and had applied for maintenance on the ground of wilful neglect to provide reasonable maintenance while her application of November, 1947, for permanent alimony was pending, he felt no doubt that a conflict between two courts of competent jurisdiction would have arisen, and that it would have been proper, on the authorities, for the justices to have stayed their hand until the application for permanent alimony had been dealt with by the High Court. His Lordship continued:]

Whatever else may be said, it seems to me to be quite impossible to dispute that the application for permanent alimony had been disposed of, and no longer existed, after it had been dismissed by the registrar on January 16, 1952. From that it follows, so it seems to me, that when the wife took out her present summons on the ground of wilful neglect to maintain five days later, namely on January 21, 1952, there neither was, nor could be, any conflict between that summons and the application (I am deliberately using these words) for permanent alimony instituted by her in November, 1947. But what is said is this: her suit in the High Court still existed; she had deliberately elected to proceed for a judicial separation in the High Court on the ground of her husband's adultery instead of going to the justices before whom such adultery had been made an available ground under the Matrimonial Causes Act, 1937, and, therefore, because the institution of that suit gave, and still gives, all the rights to ancillary relief which may be claimed in the High Court in such a suit, there is, notwithstanding the dismissal of her application, a conflict of jurisdiction.

[His Lordship referred to the reasons given by the justices and continued:] Before I come back to the main point of this case I must pause here to notice something which Mr. Robson's ingenuity has pointed out to us. I regret to say that I have appreciated for the first time that it is no longer quite so clear as it would appear to be on the face of rule 45 that the wife in a suit for judicial separation can bring her application for alimony at any time, or that the rule which says that she can do so is intra vires. The point arises in this way:—The relevant section of the Supreme Court of Judicature (Consolidation) Act, 1925, was section 190 (4), and, eliminating the reference to a restitution suit, with which I do not propose to deal at the moment, the relevant words are " Where any decree for . . . judicial separation " is made on the application of the wife, the court may make " such order for alimony as the court thinks just." In other words, all that was necessary was that a decree for judicial separation should have been made, and made on the application of the wife. But when the Consolidation Act was passed in 1950 there was a change in the wording, and it is to be found in section 20 (2):—" On any decree for judicial separation, the court " may make such order for the payment of alimony to the wife " as the court thinks just." As is well known, the use of the words " on any decree " in connexion with the earlier subsections of the same section of the Supreme Court of Judicature (Consolidation) Act, 1925, in their application to divorce and nullity, has given rise to a great deal of litigation, which I do not propose to discuss. Suffice it to say that judicial attempts to release the fetters, or to wriggle out of the fetters imposed by the words " on " any decree," have not met with universal success, and the one thing that is quite certain is that " on any decree " and " where " any decree is made " are not synonymous expressions. When, therefore, the group of sections relating to alimony, maintenance and custody of children in the Consolidation Act of 1950 perpetuates the words " on any decree " for divorce or nullity, and uses the same formula with reference to a decree for judicial separation, it is likely, now that attention has been directed to the matter, to lead to the suggestion that the word " on " must have the same significance in both sections, even if it can be argued, as no doubt it could be argued, that regard must be had to the fact that in one case one is dealing with a marriage which has been dissolved, and with persons who are no longer husband and wife, while in the other case one is dealing with persons who, though judicially separated, are still husband and wife. Nevertheless, the question will still arise whether the Rules Committee exceeded their powers in keeping alive the effect of the wording of the old Act by saying in rule 45 of the Matrimonial Causes Rules, 1950, that "an application . . . for permanent alimony may be "made at any time"—(leaving out again the immaterial words) —"after a decree for judicial separation . . . has been "pronounced." I have looked, now that attention has been drawn to this point, at the parliamentary transactions which led up to this Consolidation Act. There was, as the memorandum[7] which is called for by the Standing Orders of the House shows, an intention to make a slight alteration in the law, but it was quite plainly not the intention to make an alteration which had the effect suggested. What was intended, as the memorandum shows, was to enable the court to give the wife alimony on a judicial separation whether the proceedings were initiated by her or by her husband. The real emphasis is not "'*on*' any decree" but "on '*any*' decree," on the second word and not on the first. However, there it is.

Let me say at once that I do not wish, as it would manifestly be unfair to the justices, to make any sort of criticism of their use of the above rule in support of their reasoning; but I ought, before leaving this side-issue, to say that Mr. Robson argues that on any view of the matter, now that we know that the words "on any decree for judicial separation" are in the Act of

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[7] Proposal 3 of the memorandum laid before Parliament on May 26, 1950, pursuant to 12, 13 & 14 Geo. 6, c. 33 [Consolidation of Enactments (Procedure) Act, 1949]: "The new subsection (4) proposed to be substituted for "section 190 (4) of the Supreme Court "of Judicature (Consolidation) Act, "1925, effects another small piece of "codification. The subsection deals "with the court's powers to grant permanent alimony in cases of judicial "separation and restitution of conjugal rights, but only covers cases "where the petition is brought by the "wife. Undoubtedly the court also "has power to grant permanent "alimony in the case of a judicial "separation granted on the application "of the husband, the power "being derived from the jurisdiction "inherited from the old ecclesiastical "courts. The new subsection accordingly includes this power and so "covers all the powers of the court to "grant permanent alimony, i.e., on "a decree of judicial separation, "whether granted on the application "of the wife or the husband, and on "a decree for the restitution of conjugal rights made on the application of the wife." [The proposal also refers to "an incidental clarification" of section 10 (2) of the Matrimonial Causes Act, 1937.]

Parliament, it would be difficult after the lapse of six years and after the dismissal, on her own application, of her original application for alimony, allowing the utmost liberality of interpretation in reference to a suit for judicial separation, as contrasted with a suit for divorce, to the word "on," to say that any application now brought by the wife could by any stretch of construction be described as "on the decree" which she obtained in 1946.

But though it has been necessary to notice that particular point, because it is one of some public importance, it is, in my opinion, a comparatively subsidiary point in this case, for the real substance of the justices' reasons and of the argument that has been addressed to us in support of them is that the mere existence of the proceedings for judicial separation always has raised, and still raises, a conflict of jurisdiction in connexion with maintenance. The justices say that the argument to the contrary was unsupported by any authority cited to them. I have already read the passage. There is authority to the contrary and the case to which I am referring is a decision of this court in January, 1952, namely, *Pooley* v. *Pooley*.[8] It was a case in which a wife, who had obtained a maintenance order on the ground of desertion, had presented a petition for divorce on the ground of the continuation of the same desertion for the statutory period, and then wished to bring ancillary proceedings for maintenance in the High Court. Realizing rightly that she could not have two maintenance orders running at the same time, and consequently that proceedings for maintenance in one court would not be encouraged while there was already a subsisting order in another court of competent jurisdiction, she applied to the magistrate's court for the discharge of her subsisting order. That court refused to discharge it, because the mere exercise of the jurisdiction to discharge it, albeit it was for the very purpose of evading a conflict of jurisdiction, would give rise to a conflict of jurisdiction, and the wife appealed.

In a sense this case is the converse case. But I think that there are passages in the judgment which was given on that occasion which really dispose of the suggestion that the mere presentation of a petition, whether for divorce or judicial separation, because thereunder it will be possible to exercise certain rights to claim maintenance, ipso facto raises a conflict of jurisdiction. I will read the headnote:—"A wife who is taking "divorce proceedings is entitled to pursue her rights for

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[8] [1952] P. 65.

"maintenance for alimony pending suit in the divorce court "provided that she has any existing order for maintenance made "under the Summary Jurisdiction (Separation & Maintenance) "Acts, 1895 to 1949, discharged. But she is under no obligation "to apply for the discharge of that order before presenting a "petition for divorce; and such an application creates no conflict "between the two jurisdictions." I do not think it is really necessary to go through the judgment in detail, but that is an accurate summary of certain passages in the judgment. The point, I think, is this, that if the contention is correct that the mere presentation of the petition and the subsistence of the suit even after the pronouncement of a decree creates a conflict of jurisdiction, it would be necessary to get rid of the justices' order before presentation of the petition. But we were very careful to say that that was not so. I will read one passage [9]: "Even if the course which he"—(that is, the magistrate)—"suggests—namely, that of making an application to the divorce "court"—(that is, for maintenance)—"having it adjourned for "a specified period and then going back to the magistrate's "court to get the order set aside—is the proper solution of the "difficulty, the matter is still pending in both courts. There is "no escape from it unless the wife does one thing, namely, goes "back to the magistrate" (that is to say, for the discharge of her order) "before presenting her petition. In my opinion there "is no sort of obligation on her to do that." I think the true effect of that decision may be summarized in this way:—The mere possibility that identical issues may arise in the High Court and in a court of summary jurisdiction does not give rise to a conflict of jurisdiction. It is the identity of the actual issues in the two courts which is the mischief at which decisions like *Higgs* v. *Higgs* [10] and the decision of Barnard J. in *Kilford* v. *Kilford* [11] are aimed.

In my opinion there ceased to be any conflict after the dismissal of the wife's application in the High Court on January 16, 1952. It would really be more accurate to say that when the wife issued the present summons five days after the dismissal on January 16, 1952, of her application in the High Court, there was no conflict. The mere possibility that she might raise further proceedings for alimony or maintenance in the High Court will not do, though, as I have already said, I think that her right to do so in the same form is extremely doubtful in the circumstances of this case. But I think the principle goes further, and has a universal application, for, apart altogether from any proceedings which she could, or could not, take for alimony in the suit for judicial separation, she has under what is now section 23 of the Matrimonial Causes Act, 1950, the right to sue in the High Court for wilful neglect to provide reasonable maintenance. If she did so, of course, there would be a conflict of jurisdiction with her present summons; but unless she does so the mere possibility that she might do so, or that she has the right to do so, does not, in my opinion, raise any conflict of jurisdiction at all.

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[9] [1952] P. 65, 69.

[10] [1935] P. 28.

[11] [1947] P. 100.

In my opinion the justices were wrong in this case, and the appeal must be allowed, the order dismissing the wife's summons set aside, and the matter sent back for determination.

DAVIES J. I entirely agree, and I will express my reasons quite shortly. As my Lord has said, there is in many respects a co-equal jurisdiction between courts of summary jurisdiction on the one hand and the High Court on the other in these matters which arise between husband and wife. And the principle, as I have always understood it, which applies to such cases, is that if on the same issue between the same parties there is an actual conflict of jurisdiction or there is a reasonable likelihood or probability of such a conflict of jurisdiction, then the inferior court should not, as a matter of obvious convenience and public policy, proceed with the hearing of the summons.

If that is right, and if one applies that principle to the facts of the present case, it is in my judgment plain that there was no actual conflict of jurisdiction. In January, 1952, the proceedings for alimony in the judicial separation suit had been finally terminated, so that when this matter came before the justices in February, 1952, there was no proceeding for alimony at all in the High Court. There then being no actual conflict of jurisdiction, was there, in the words which I have used, a reasonable likelihood or probability of a conflict of jurisdiction?

What is said on behalf of the husband is this: "True, those "proceedings had been put an end to by the order of the district registrar. But the suit for judicial separation was still in existence, as the decree had been pronounced, and at any time the wife could come along and apply for alimony, in which event the same issues would arise. In my opinion, that speculative possibility does not give rise to such a reasonable likelihood or probability of a conflict of jurisdiction as should have induced the justices to adjourn the hearing before them. After all, the wife in this case, who is entitled, other things being equal, to choose which court she will proceed in, had done all she could to make it plain that she was not going on in the High Court but that she was going on in the court of summary jurisdiction.

Indeed, this case is almost the converse of the case of *Pooley* v. *Pooley*.[12] I need read only two sentences from the judgment of my Lord in that case. There the President said [13] "I think that the whole of the suggestion that there is a "conflict between the two jurisdictions in getting rid, pending "suit, of the old order, is a fallacy. The truth and the reality "of the matter is that the application is made to ensure that "there is no overlapping between the two." That is exactly what the wife did in the present case when she went to the district registrar and had the proceedings in the High Court disposed of. Therefore, in my opinion, on February 22, 1952, when this matter came before the justices, not only was there no actual conflict but there was no reasonable likelihood or probability of conflict of jurisdiction, and they should have proceeded.

That, of course, is sufficient to dispose of the present appeal. But there are two other points which were taken by Mr. Robson on behalf of the wife, which it is right that I should mention quite shortly. His submission is that not only was there no reasonable likelihood of a conflict, but that there could in no event ever have arisen again any conflict at all. The first ground for that submission is that once the application for alimony had been dismissed it could not thereafter be renewed. That point was not fully argued before us, and I do not propose to express any opinion about it one way or the other. The other ground raises, as my Lord has said, matters of very much more general importance and interest. The proposition is that as the result of the change of wording in section 20 (2) of the Matrimonial Causes Act, 1950, as opposed to the wording of section 190 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925—the change from the words "Where any decree for . . . judicial separation is made" to the words "On any decree for judicial separation"—the same principles which have hitherto been applied to applications consequent upon divorce or nullity should apply to applications consequent upon judicial separation. And, as we all know from many cases, of which perhaps the best-known is *Scott* v. *Scott*,[14] it has been held that, without putting any final and precise limit of time upon it, "on any decree" means, within, at any rate, a reasonably short time after the decree. Mr. Robson argued that that principle must now, as the result of the change in the wording of the Act, be applied to applications for permanent alimony. As I have said, it is not, in my judgment, necessary to pronounce, for the purposes of this appeal, a final view upon that contention. But it does seem to me, speaking entirely for myself, that there is a very great deal of force in that argument. And it may well be that on that point alone not merely is there not any reasonable likelihood of the wife applying again in the judicial separation suit, but that, in fact, by the wording of the Act, she is now after the lapse of six years barred in law as well.

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[12] [1952] P. 65.

[13] Ibid. 69.

For these reasons I entirely agree with the judgment of my Lord.

Appeal allowed.

Solicitors: *Theodore Goddard & Co. and Deacons & Pritchards for H. K. and H. S. Bloomer & Co., Grimsby; Russell Jones & Walker for Pearlman & Rosen, Hull.*

J. B. G.

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[14] [1921] P. 107.

1952
Oct. 23.

Lord Merriman P. and Davies J.

RICHARDS *v.* RICHARDS.

Husband and Wife — Justices — Persistent cruelty — Dismissal of previous summons—Evidence of allegations prior to that dismissal.

The dismissal by a court of summary jurisdiction of a charge of persistent cruelty does not necessarily preclude a wife from adducing evidence of conduct prior to that dismissal on the hearing of a subsequent summons also based on persistent cruelty. The second summons must be determined upon evidence of the whole course of conduct which is alleged to constitute the offence.

APPEAL from the justices for the City of Coventry.

The parties were married in 1938. On January 5, 1952, the wife issued a summons on the ground of persistent cruelty: that summons was dismissed on January 31, 1952. On May

27, 1952, she issued a further summons on the same ground, which was heard on July 3, 1952. At the hearing an attempt was made to introduce evidence of alleged acts of violence dating back to 1944, and including acts alleged to have taken place in December, 1951; but the justices of their own motion (and not on a submission on behalf of the husband) interposed, and refused to hear such evidence on the ground that it had previously been disposed of. Evidence was accordingly confined to matters alleged to have taken place after the dismissal of the first summons, and the present summons was dismissed. This included allegations of three blows in the face and a bruise on the buttock in February, 1952, which was corroborated by another witness, and an allegation of mental cruelty, including the statement that she was humiliated before the children by the husband telling them to take no notice of her, and using bad language in front of them. In their reasons the justices stated: "The evidence of the complainant proved her to be "non-co-operative and provocative in her attitude towards the "defendant. There is not sufficient evidence of cruelty by the "husband towards the wife, and in consequence the court has "no power to accept evidence of allegations prior to January 31, "1952. Finally, the husband by his solicitor having elected to "stand upon a submission that the husband had no case to "answer and to call no evidence, leaves us with only the "above evidence to consider. We accordingly dismiss the "application." The wife appealed.

D. R. Ellison for the wife.
J. D. F. Moylan for the husband.

LORD MERRIMAN P. The sole point of this appeal is whether the justices were entitled to refuse to hear evidence of any alleged ill-treatment by the husband of the wife antecedent to the dismissal of her first summons.

[His Lordship stated the facts, referred to the justices' reasons, and continued:] The question is whether the justices have so seriously misdirected themselves, and so improperly rejected evidence which was tendered, that it is impossible for us to uphold the decision, in spite of the improper rejection of evidence, on the ground that no substantial miscarriage of justice has occurred. I think that this is a very serious misdirection, which goes to the root of the case. The same sort of point has been before this Divisional Court more than once in recent years, and our attention has been called to *Molesworth* v. *Molesworth*.[1] That case related to an alleged estoppel in connexion with a charge of wilful neglect to maintain by the withdrawal of that charge in favour of a summons for desertion. If I may quote from my own judgment, when referring to a decision of Sir Samuel Evans P. in *Stokes* v. *Stokes*,[2] in which he had laid down the principle that the same cause of complaint which had been adversely determined against the complainant could not be raised again by her in a court of summary jurisdiction, I said in reference to his statement[3] that "the fact that desertion is a continuing offence makes no "difference; because desertion must be referable to some particular time when it began," that that passage would go too far if it were sought to apply it to all possible cases of desertion. I am reported as having said[4]; "It makes all the difference in "the world in certain circumstances for precisely the same "reason that in a charge of persistent cruelty the conduct which "is alleged, within the period of the summons which is being "dealt with, to amount to persistent cruelty can only be judged "in the light of the whole course of conduct, and the mere "fact that at an earlier stage, when the conduct was only "partly completed, a court has adjudged that at that point "it does not amount to persistent cruelty, does not shut that "evidence out for ever any more than it does in certain cases "of desertion."

It is said, and truly said, that the introduction of the analogy to a charge of persistent cruelty in the case with which we were then dealing was obiter dictum; but our attention has been called to an unreported case, *Jones* v. *Jones*,[5] which appears to me to raise substantially the point which we are now asked to decide. It is true that that case was also a case of desertion, but it was a case of constructive desertion. In November, 1950 the wife had taken out a summons which was dismissed, and when the matter came before the same court on another summons in September, 1951, it refused to go into the history antecedent to the dismissal of the summons in November, 1950. In the present case, counsel for the wife submitted that he was entitled to call the evidence of incidents prior to January 31, 1952, but the bench held that there was not sufficient evidence of cruelty "to allow" the revival of previous evidence of matters which had become res judicata.

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[1] [1947] 2 All E.R. 842.
[2] [1911] P. 195.
[3] Ibid. 199.
[4] [1947] 2 All E.R. 842, 844.
[5] October 25, 1951 (Lord Merriman P. and Collingwood J.).

Similar phraseology was used in *Jones* v. *Jones*,[5] and in my judgment I said: "The justices do not say that they do not "believe the wife. If they had said that, of course, there "would have been no more to argue about. But they begin "by saying that a complaint by the wife had been inquired into "on a summons heard in November, 1950, and dismissed. As "a matter of history, that is true. They then go on to say that "nothing of a substantial character or of any gravity had taken "place which would revive what had gone before to justify "the wife leaving her husband again in February, 1951."

That differentiates the case from *Stokes* v. *Stokes*.[6] We were dealing, not with the same period and the same separation, but with a different separation. "It is quite clear," I went on, "that the use of the word 'revive' is wrong in that context, "but I do not want to make too much of that by itself. I think "that the plain explanation of it is what Collingwood J. suggested in the course of the argument, namely, that there was "nothing which had occurred since her return in December to "justify the justices in considering what had happened before the "dismissal of the summons in November. Now, that must be "wrong. Equally, of course, it is wrong to talk about revival as "if some offence had been committed and condoned and there "was the question whether there was enough to revive it. If "there had been an offence, for example, if cruelty had been "established up to November—(I am not supposing there was a "charge of cruelty, but if there had been a charge of cruelty, or "if she had said that the case was of such gravity that it "amounted to persistent cruelty, and that had been found to be "the case)—then the use of the word 'revive' would have been "right, because she had condoned it by coming back. But it "was not. It is not a case of reviving an offence which had been "committed, because they found none had been committed at "the time. If, on the other hand, what they are saying is: "'What happened afterwards was not enough to justify us in "'considering anything else,' then in my opinion they are "plainly wrong. And that is what I think they have said. "Unless the case in November was disposed of on the footing "that the wife was not telling the truth at all and they did not "believe a word of what she said, of which there is no suggestion,

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[5] October 25, 1951 (Lord Merriman P. and Collingwood J.).

[6] [1911] P. 195.

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"this is plainly a case in which the whole conduct, including, "no doubt, the dismissal of the summons, is relevant up to the "moment of the last hearing. To put it another way, the mere "fact that in November, 1950, the court thinks that there has "not been a sufficient accumulation of facts to justify the wife "in withdrawing from cohabitation, and that she has, so to "speak, struck too soon, does not disentitle her to bring those "facts into consideration three months later and say: 'Now look "'what has happened in the meantime. It is impossible to say "'I have struck too soon now.'"

Although *Molesworth* v. *Molesworth*[7] was not cited to us, so far as I can see, looking at my note of that appeal, that is exactly the same reasoning as actuated me when I said that[8] "in a charge of persistent cruelty the conduct which is alleged, "within the period of the summons which is being dealt with, "to amount to persistent cruelty can only be judged in the light "of the whole course of conduct, and the mere fact that at an "earlier stage, when the conduct was only partly completed, a "court has adjudged that at that point it does not amount "to persistent cruelty, does not shut that evidence out for "ever."

In my opinion we have no option in this case but to send the matter back to the justices to hear the wife's case. It is quite impossible for us to judge whether, on the course of conduct as a whole, a charge of persistent cruelty has or has not been made out. That must be determined by the justices, but upon evidence of the whole course of conduct which is alleged to constitute the course of persistent cruelty.

DAVIES J. I entirely agree.

Appeal allowed.

Solicitors: *Thompson, Quarrell & Megaw for Blythe, Owen George & Co., Coventry; Sharpe Pritchard & Co. for S. G. Ansell & Co., Coventry.*

J. B. G.

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[7] [1947] 2 All E.R. 842.

[8] Ibid. 844.

EVANS *v.* EVANS.

C. A

1952
Dec. 11, 12.

Singleton and
Morris L.JJ.

Legal Aid—Divorce—Security for wife's costs—Both husband and wife "assisted persons"—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940) (*L.* 27), *r.* 65 (3).

An application was made under rule 65 (3) of the Matrimonial Causes Rules, 1950, for security for the wife's costs in a divorce suit in which both parties were legally assisted persons, the National Assistance Board having assessed the petitioning husband's maximum contribution to the legal aid fund at £70 and the respondent wife's contribution as nil. The registrar, who had before him no other evidence as to the circumstances and means of the parties than the husband's legal aid certificate, ordered him to provide security to the extent of £20. On appeal, Collingwood J. upheld the registrar:—

Held, (1) that in the absence of regulations under section 12 (2) (*b*) (ii) of the Legal Aid and Advice Act, 1949, the power of the Divorce Court under rule 65 (3) of the Matrimonial Causes Rules, 1950, to order security for a wife's costs remained, and it might do so even though both parties were legally assisted persons, but in that case it was very seldom that an application for security should be made;

(2) that it was undesirable that there should be an order for security made against the petitioner on no information other than that which was before the National Assistance Board, and the order would be set aside.

Conway v. *Wimpey* (*George*) *& Co. Ld.* [1951] 1 T.L.R. 215; [1951] 1 All E.R. 56 distinguished.

Vincent v. *Vincent,* ante, 13; [1952] 2 T.L.R. 907; [1952] 2 All E.R. 978 applied.

Order of Collingwood J. reversed.

APPEAL by the husband petitioner from an order of Collingwood J. (sitting in chambers).

On January 3, 1952, William Harold Evans filed a petition for a decree of dissolution of his marriage with Clara Ethel Evans on the ground of cruelty. The wife made application for legal aid, and, on February 9, 1952, she was granted a civil aid certificate to defend the suit. Her disposable income was stated to be £156, her disposable capital £8, and her maximum contribution to the legal aid fund was assessed as nil. On July 21, 1952, she filed an answer to the petition.

The husband also applied for legal aid, and, on September 18, 1952, he was granted a legal aid certificate, the National Assistance Board determining his disposable income at £296, his disposable capital as nil, and his maximum contribution as £70. The local committee assessed his contribution at the same sum, £70, payable by an initial instalment of £4 and then 11 monthly payments of £6 each.

On November 3, 1952, an application was made to the District Registrar of Brighton that he should order the husband petitioner to give security for the wife's costs of the hearing. The registrar had before him the civil aid certificate of the husband. He ordered that the husband should provide security to the extent of £20. The husband appealed to Collingwood J., who upheld the registrar, and from that decision the husband appealed again, both parties being assisted persons for the purpose of the appeal.

R. D. Ranking for the petitioner husband. As both parties are assisted persons there is no power to make an order for security for costs on an application under rule 65 (3) of the Matrimonial Causes Rules, 1950,[1] until the regulations envisaged by section 12 (2) (*b*) (ii)[1] of the Legal Aid Act, 1949, have been made. In

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[1] Matrimonial Causes Rules, 1950, r. 65 (3): " Where an application for " security has been made under this " rule, a registrar shall ascertain what " is a sufficient sum of money to cover " the costs of the wife, and if, after " taking all the circumstances into " account, including the means of the " husband and the wife, he considers " that the husband should provide " security for all or some of the wife's " costs, he may order the husband to " pay the sum so ascertained, or some " portion of it, into court or to give " security therefor within such time " as he may fix, and may direct a " stay of the proceedings until the " order is complied with."

Legal Aid and Advice Act, 1949, s. 1 (7): " Save as expressly provided " by this Part of this Act or by regu- " lations made thereunder,— . . . (*b*) " the rights conferred by this Part of " this Act on a person receiving legal " aid shall not affect the rights or " liabilities of other parties to the " proceedings or the principles on " which the discretion of any court or " tribunal is normally exercised."

S. 2 (2): " Where a person receives " legal aid in connexion with any pro- " ceedings— . . . (*e*) his liability by " virtue of an order for costs made " against him with respect to the " proceedings shall not exceed the " amount (if any) which is a reason- " able one for him to pay having " regard to all the circumstances, in- " cluding the means of all the parties " and their conduct in connexion with " the dispute."

S. 3 (1): " A person's contribution " to the legal aid fund in respect of " any proceedings may include—(*a*) a " contribution in respect of income " not greater than half the amount " (if any) by which his disposable " income exceeds one hundred and " fifty-six pounds a year; and (*b*) a " contribution in respect of capital not " greater than the amount (if any) by " which his disposable capital exceeds " seventy-five pounds."

S. 4 (6): " Subject to the provisions " of this section, a person's disposable " income and disposable capital, and " the maximum amount of his con- " tribution to the legal aid fund in " respect of any proceedings, shall be " determined by the National Assist- " ance Board, and the board may " call attention to any special cir- " cumstances affecting the maximum " amount of the lump sum and " periodical payments which he could " reasonably make on account of any " contribution."

S. 12: " (1) The Lord Chancellor

Conway v. *Wimpey (George) & Co. Ld.*[2] Cohen L.J. said that until the regulations had been made, in the absence of special circumstances, an order should not be made against an assisted person. It is submitted that that is even more so when both parties are assisted, and it is difficult to see the need for making such an application. In *Wigley* v. *Wigley*[3] it was said that there was nothing in the Act of 1949 which limited the right of an assisted wife to apply for security for her costs, but there only the wife was assisted. It may be argued that Singleton L.J. suggested[4] that an application for security for costs might have to be considered when both parties were assisted, but those remarks were clearly dicta and *Wigley* v. *Wigley*[3] itself is distinguishable on the facts. Similarly, *Vincent* v. *Vincent*[5] is distinguishable, for there, again, only one party was assisted, in that case the husband. Barnard J., in giving his decision in *Vincent* v. *Vincent*,[5] referred to a direction issued by the Senior Registrar of the Divorce Court on January 29, 1951, based on *Conway* v. *Wimpey (George) & Co. Ld.*,[6] to the effect that an order for security for costs ought not to be made against an assisted person in the absence of special circumstances. Barnard J. said that that direction was a misapplication of the principle which was not directed to divorce practice; it failed to take account of the peculiar nature of the wife's security for costs in the Divorce Division. With respect it is, however, submitted that the Act of 1949 has done away with the basis for the old practice (the point of which was explained in *Williams* v. *Williams*[7]) and has left the Lord Chancellor to deal with the position by regulations.

If, however, the registrar has power to make an order for security, his jurisdiction seems to be in conflict with that of the

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"may make such regulations as appear "to him necessary or desirable for "giving effect to this Part of this Act "or for preventing abuses thereof. "(2) Without prejudice to the fore-"going subsection or any other pro-"vision of this Act authorizing the "making of regulations, regulations "may . . . (*b*) regulate the procedure "of any court or tribunal in relation "to legal aid, and in particular make "provision . . . (ii) as to the cases in "which and extent to which a person "receiving legal aid may be required "to give security for costs, and the "manner in which it may be given."

Legal Aid (Assessment of Resources) Regulations, 1950 (No. 1358), Sch. 2, para. 6: "No account shall be taken "of any loose cash in the possession "of the person concerned reasonably "necessary to meet his current require-"ments so far as it does not exceed "£20."

[2] [1951] 1 T.L.R. 215; [1951] 1 All E.R. 56.

[3] [1951] P. 156; [1950] 2 All E.R. 1218.

[4] [1951] P. 156, 159.

[5] Ante 13; [1952] 2 T.L.R. 907; [1952] 2 All E.R. 978.

[6] [1951] 1 T.L.R. 215.

[7] [1929] P. 114.

National Assistance Board. By section 4 (6) of the Act of 1949 the Board are required to assess the maximum amount that the husband can reasonably be required to pay to the fund, and if, after that assessment has been made and adopted by the Legal Aid Committee, the registrar requires the husband to make a contribution to the wife's costs, he will be paying more than the assessed maximum sum. The implication in such circumstances is either that the National Assistance Board under-estimated the litigant's means or else that the registrar has required the husband to pay more than he can afford. In the latter case it may be impossible for him to go on with his appeal (or may greatly delay it, if the husband is required to pay by instalments).

[Singleton L.J. It would seem that the wife might apply to have the action dismissed while the husband was slowly accumulating the necessary funds.]

It is correct that a litigant may have to pay something under section 2 (2) (*e*) in addition to his own contribution, but that payment is decided on and payable after the hearing, so that the practical effect would be quite different.

The principle in *Conway* v. *Wimpey (George) & Co. Ld.*[8] was limited by *Burton* v. *Holdsworth*[9] and *Jackson* v. *John Dickinson & Co. (Bolton) Ld.*,[10] but neither limitation is in point here.

Alternatively, if the registrar had power to make an order for security, his discretion was exercised wrongly in this case, for he made the order on the basis of the legal aid certificate without any other evidence.

Kenneth Jones for the wife. The mere fact that the husband is an assisted person does not rule out the power for making an order for security for the wife's costs. [Counsel referred to *Vincent* v. *Vincent*.[11]] Further, if the wife alone is legally aided, *Wigley* v. *Wigley*[12] shows that the usual divorce practice is not changed and an order can still be made. Finally, it is submitted that there is nothing which bars an order being made if both parties are aided. Consequently the wife's rights are preserved by section 1 (7) (*b*) of the Act of 1949. Section 2 (2) (*e*) of the Act shows that an order for costs can be made against an assisted person over and above the maximum contribution, and there is no logical distinction between such an order and an order for security for costs.

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[8] [1951] 1 T.L.R. 215.

[9] [1951] 2 K.B. 703; [1951] 2 T.L.R. 435; [1951] 2 All E.R. 381.

[10] [1952] W.N. 9; [1952] 1 All E.R. 104.

[11] Ante 13.

[12] [1951] P. 156.

If the power exists to make the order, the exercise of it is at the discretion of the registrar. Each case must be considered on its merits and the court would be slow to interfere unless satisfied that the discretionary power had been exercised on wrong principles so that there had been a miscarriage of justice. On the facts that is not so here. The sum assessed by the National Assistance Board is not the maximum that the assisted litigant can be called on to pay at any stage. It is merely the proper sum that he can be called on to contribute towards his own costs. There is no conflict of jurisdiction between the National Assistance Board and the registrar, for the National Assistance Board assess the litigant's capacity to pay by reference to his normal way of living and they are required by the regulations to ignore certain resources. For example, no account is to be taken of loose cash up to £20 (see the Legal Aid (Assessment of Resources) Regulations, 1950 (No. 1358), Sch. 2, para. 6). There may, therefore, be some sum which the husband could reasonably be required to contribute towards his wife's costs, even if the possibility of a change of circumstances since the certificate was made is put aside. The registrar is not bound hand and foot by the legal aid certificate; he will regard it as a strong indication of the husband's means, but not necessarily a complete picture (unlike an affidavit of means which should be complete for his purpose). He has to consider all the "means" of the litigant, and in *Maclean* v. *Maclean*[13] "means" for the purposes of rule 65 (3) of the Matrimonial Causes Rules, 1950, were said to be "any realizable "asset." He proceeds on much the same basis as the judge under section 2 (2) (*e*) of the Act of 1949, but possibly the legal aid certificate is a better guide to the registrar than to the court as it would be more recent when it came before the registrar.

SINGLETON L.J. stated the facts, substantially as set out above, and continued:—The benefit of the legal aid scheme to the parties is apparent. The wife secures legal aid without contributing anything, and the husband, the petitioner, who has considerable earning power, has to provide £70 by instalments (which some years ago would have been enough to cover the costs of a petition of this kind). The benefit to him of the scheme is that he knows the extent of his liability, apart from the possibility of an order for costs being made against him later, and he is able to pay the money by instalments.

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[13] [1951] 1 All E.R. 967.

The Legal Aid and Advice Act, 1949, provides by section 2 the financial conditions of legal aid; section 3 is concerned with the contributions which assisted persons are to make. [His Lordship read section 4 (6) and said:] It was under that subsection that the National Assistance Board determined the maximum contribution, which the petitioner could make towards his own costs, at the sum of £70.

[His Lordship read section 12, commenting that no regulations had been made as yet. He then read rule 65 (3) of the Matrimonial Causes Rules, 1950, and continued:] That rule states the power of the court when an application is made by a wife, who is in this case the respondent, for security for her costs. The present form of rule 65 (3) dates from 1947. It provides expressly that one of the matters to be taken into account on an application for security for costs is the means of the husband.

[His Lordship referred to the order made by the registrar and continued:] The husband appealed to Collingwood J. against that order, but the judge said that he was bound by *Vincent* v. *Vincent*,[1] and upheld the registrar.

Mr. Ranking, on behalf of the husband, put forward two submissions to this court. The first was that where both parties were legally aided, there was no power to make an order for security for costs. His second point was that, even if there was power, the making of the order for £20 security in this case was a wrong exercise of the discretion conferred on a registrar and that the order in question ought to be set aside.

In December, 1950, there was before this court *Conway* v. *Wimpey (George) & Co. Ld.*,[2] in which the plaintiff had been ordered to provide security for the costs of an appeal. Immediately thereafter, the plaintiff became an assisted person and an application was made that the order for security should be discharged. The judgment of the court was that, until the regulations envisaged by section 12 (2) (*b*) (ii) of the Act of 1949 were made, in the absence of special circumstances, an order for security for costs should not be made against an assisted person and, therefore, the order which had been made would be discharged. Cohen L.J., who gave the judgment of the court, said[3]: "Nonetheless, until we get the guidance of the regulations . . . "I think we must proceed on the basis that, generally speaking, "and in the absence of special circumstances, it would be

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[1] Ante 13.

[2] [1951] 1 T.L.R. 215; [1951] 1 All E.R. 56.

[3] [1951] 1 T.L.R. 215, 216.

"inappropriate to make an order for security for costs at a time "when an emergency certificate is in force." He was considering an order for security for costs made under Ord. 58, r. 15 (2).

It was submitted by Mr. Kenneth Jones that quite a different position arose in this case, for this was an application for security for the wife's costs under rule 65 of the Matrimonial Causes Rules, 1950. These rules, it should be noticed, were made after the Legal Aid and Advice Act of 1949, and, indeed, after the decision of the court in *Conway* v. *Wimpey (George) & Co. Ld.*[4] In the absence of regulations under section 12 (2) (*b*) (ii), it cannot be said that the power of the Divorce Court to order security for a wife's costs has ceased. I think it remains, and a party, whether assisted or not, may make an application under the provisions of rule 65 even though the other party be an assisted party. The matter then has to be considered. At the same time, I think that it is very seldom that such an application should be made.

It seems to have been thought that the principle laid down in *Conway* v. *Wimpey (George) & Co. Ld.*[4] should be taken to cover divorce practice as well. I am inclined to think it would have been a good thing if it had been so treated by the court, though the court was not then concerned with a matrimonial suit.

A practice direction was issued by the Senior Registrar of the Divorce Court, which I should describe as extremely useful from the point of view of practice, though Barnard J. seems to have thought that it was not worded quite rightly. This court was given to understand that the registrar at Brighton did not have it before him when considering this application. The direction is: "*Legal Aid. Costs, security for.* In the absence of any regulations under section 12 of the Legal Aid and Advice Act, 1949, "the decision in *Conway* v. *Wimpey (George) & Co. Ld.*[4] must "be taken to prevent the making of any order for security for "costs against an assisted person unless there are special "circumstances. The fact that a legally aided husband has been "directed by the local committee to pay a contribution less than "the maximum contribution may be regarded as a special "circumstance, and an order to secure for the wife's costs a sum "not greater than the difference between the actual and "maximum contributions may be made in a proper case."

In November, 1952, Barnard J. decided *Vincent* v. *Vincent.*[5] In that case the husband filed a petition for divorce on April 25,

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[4] [1951] 1 T.L.R. 215.

[5] Ante 13.

1951, on the ground of his wife's desertion. On January 14, 1952, he obtained a civil aid certificate to enable him to carry on the proceedings. On July 22, 1952, the wife obtained a civil aid certificate limited to obtaining an order for security against the husband. On August 28, 1952, the wife's application to the registrar for such an order was dismissed on the ground that no order for security could be made against an assisted person. On appeal to Barnard J. it was held that it was a well-established practice in the Divorce Division that a wife had a right to apply for her security for costs, and that that was not affected by the husband being an assisted person, and, therefore, the registrar was bound to comply with rule 65 (3) of the Matrimonial Causes Rules, 1950, and the case would be referred to him for that purpose.

Barnard J., in giving his decision, pointed out that Cohen L.J. in *Conway* v. *Wimpey (George) & Co. Ld.*[6] was careful to make it clear that he was not seeking to lay down a general rule covering all classes of case and all circumstances, and continued [7]: "The registry, by their direction, have interpreted the decision in "*Conway's* case as applying to a wife's application for security "for costs in the Divorce Division. I have come to the con-"clusion that this direction is a misinterpretation of the decision "in *Conway's* case. It is a well-established practice of this "division that a wife has a right to apply for security for her "costs, and Lord Merrivale P. once said, in *In re A. B.'s* "*Petition* [8] ' . . . there is something in the nature of a prescrip-"' tive right upon cause shown to secure to the wife the means "' for defence.' "

Barnard J. then referred to *Williams* v. *Williams*,[9] where Hill J. said: " ' The main object of security, in recent years at "' any rate, is that justice may be done by the wife being enabled "' to procure the assistance of solicitor and counsel and come to "' court. That is the main object in modern times. The old "' basis for the rule, namely, that all the wife's property on "' marriage passes to the husband, and therefore the husband "' alone can foot the bill, has gone altogether, and now you "' must consider whether in the circumstances the wife can foot "' the bill, and it is a very important matter to consider whether "' the solicitor can conduct the business without something in "' court to pay him up to setting down and without security.' "

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[6] [1951] 1 T.L.R. 215.

[7] Ante 15.

[8] [1928] P. 25, 27.

[9] [1929] P. 114, 118.

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Barnard J. continued: "I think that the present case is a "different class of case from *Conway* v. *Wimpey* (*George*) *& Co.* "*Ld.*[10] by reason of the peculiar nature of a wife's security for "costs in the Divorce Division, which I have already indicated "and is not covered by *Conway's* case. I, therefore, allow this "appeal and refer the matter back to the registrar at Leeds to "comply with rule 65 (3) of the Matrimonial Causes Rules, 1950. "The registrar will, of course, take into account the fact that the "husband is an assisted person and will also have regard to the "facts stated in the civil aid certificate and it may well be that "he will come to the conclusion that this is a case in which no "security should be ordered." Barnard J. upheld the power of the Divorce Court to make an order for security, even though the person against whom it is made was an assisted person. I have said that I think that that power remains. The judge pointed out that if the case went back to the registrar, he might well order nothing by way of security.

In this case now under appeal the wife was an assisted person. There was no difficulty about her coming to court with solicitor and counsel for she had legal aid. Application was made to the registrar for security for costs, but in my view it would have been better not to have made it. If the registrar had properly found himself able to make an order for security, it could only have been for a trifling amount, and the cost on both sides of getting the order is at the expense of the legal aid fund. Moreover, the customary practice, when an application of this sort is made, is to produce a supporting affidavit as to means and the like, and that costs a good deal of money. There was nothing like that before the court in this case. The registrar had the legal aid certificate before him and he indorsed the summons: "I have "referred to the petitioner's legal aid certificate for particulars "of the petitioner's means and consider he is able to give security "for £20." The legal aid certificate states, at least, that the petitioner had no disposable capital. Mr. Kenneth Jones pointed out to us that, notwithstanding that, the petitioner might have had some capital which was not "disposable capital." The Legal Aid and Advice Act, 1949, referred to the National Assistance Board the duties of determining a person's disposable income and disposable capital and the maximum amount of his contribution to the legal aid fund. The reason for that course is because officers of the National Assistance Board are accustomed

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[10] [1951] 1 T.L.R. 215.

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to dealing with such matters. The Legal Aid Committee followed the advice of the National Assistance Board and, between them, they decided how much the petitioner who desired to bring his petition before the court should provide by way of contribution.

Within a very short time of that having been decided, and the petitioner having determined to pay that contribution, an application was made to the registrar by the wife (who also is an assisted person and who does not really need security for costs at all, because she is an assisted person) under rule 65. It is the duty of the registrar under that rule, after taking all the circumstances into account, including the means of the husband and the wife, to consider whether or not the husband should provide security and how much he should provide, if anything. The registrar has to consider all the circumstances including the means of both spouses. The registrar said: "I have referred to "the petitioner's legal aid certificate for particulars of the "petitioner's means and consider he is able to give security for "£20." It looks to me very much as though he considered that the petitioner was in a position to do something which the National Assistance Board thought they ought not to ask him to do. I recognize that the test which the registrar had to apply is not precisely the same as that which the National Assistance Board has to use; but it is the duty of the National Assistance Board, in a case such as this, to find out, having regard to the terms of the Act and the rules thereunder, how much is reasonable for the petitioner to pay when he is granted legal aid; and they do that. The registrar, who considered the matter very soon after the Board had made their assessment, said: "I have the "certificate before me and I consider that the husband is able "to give security for £20." That is akin to a registrar sitting on appeal from the National Assistance Board, and it is undesirable that such a position should arise.

Over and above that, the object of the Legal Aid and Advice Act, 1949, is to enable a party who has a case to put before the court, a case which is considered proper and worthy of assistance, but who has not the means to do so, to put his case forward with the help of the legal aid fund. In this case both sides have been granted legal aid. The application on behalf of the wife is: "Grant me security." It may be that the result of her application would be that one side which has legal aid would prevent the other side which also has legal aid from bringing his petition forward. It is not clear where the petitioner is to find the sum which the registrar ordered him to pay. Has he to borrow it, or has the petition to be held up for months, when it has been decided by the Legal Aid Committee that he has a proper case to bring forward ? What good purpose does the order for security serve ? I do not think that it serves any good purpose whatever. In the case of an application, such as this, made by a wife who is an assisted person, and when there is no reason to think that the husband has any means other than those which the National Assistance Board have found, I do not see what good an application for security can do to anyone when it follows immediately on the assessment of the husband's financial position by the National Assistance Board. It is a waste of time, and it is a waste of money. If there is any reason to think that there has been a change of circumstances since the Board made their assessment, or that something has been overlooked, the position is quite different; but that there should be an application of this kind without any materials put before the registrar except the civil aid certificate is difficult to understand.

Further, if it had been right to make an order which would have preserved, I suppose, the right of the wife under rule 65, it clearly ought to have been a very small order and the cost of obtaining it would be more than it was worth. The Legal Aid and Advice Act, 1949, may be, and, I think, is, of great benefit, but it is important that it should be worked reasonably. This application has led to the incurring of considerable costs. It was an application which could be made without the leave of the committee. At a later stage the leave of the committee was necessary for the petitioner to appeal to this court. It was right that that leave should be given and, as the order had been made, it was right that it should be discussed in this court.

I do not question the power to make an order under rule 65, but as Barnard J. said in *Vincent* v. *Vincent*,[11] in referring the matter back to the registrar, "it may well be that he will "come to the conclusion that this is a case in which no security "should be ordered." That is the conclusion to which I think the registrar ought to have come in this case. It is for that reason that I think the application was a mistake. If all that is put before a registrar, in a case of this kind, is the civil aid certificate, I do not think that it is right for him to say: "I have "referred to the petitioner's legal aid certificate for particulars "of the petitioner's means and consider he is able to give

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[11] Ante 16.

"security for £20." If that is the true position, one would think that a further £20 might have been ordered by way of contribution from the husband towards his own costs. I do not think that it is desirable, in view of the circumstances which are before this court, that there should be an order of this kind made against the petitioner on no information other than that which was before the National Assistance Board.

For these reasons I have reached the conclusion that this appeal should be allowed and that the order for security made by the registrar should be set aside.

MORRIS L.J. I am entirely of the same opinion. It is of interest, when considering the circumstances in this case, to note some remarks made by my Lord in *Wigley* v. *Wigley*.[12] That was a case in which the wife was an assisted person, but the husband was not. My Lord said[13]: "But, if that assisted "person is a husband, and the suit is a matrimonial suit, it "may be that thereafter an application comes for security for "the wife's costs. It is with that sort of case in mind that I "think it might be as well if regulations under section 12 (2) "(*b*) (ii) were made. Otherwise, someone will be faced with "the task of deciding what is to be done in regard to the wife's "application for security for costs when, with the help of the "National Assistance Board, the local committee have already "decided that the husband shall make the maximum payment "which he can make to the legal aid fund. There may be an "overlapping and it will be extraordinarily difficult for anyone "to say what shall be done unless further guidance be given on "that matter."

It is to be observed that by section 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, it is provided: [His Lordship read section 1 (7) (*b*), as set out above, and continued:] The Matrimonial Causes Rules of 1950 were dated December 4, 1950, and were amended by the Matrimonial Causes Amendment Rules, 1951, dated May 9, 1951. The provisions of rule 65 are, therefore, provisions which are in force during the period subsequent to the passing of the Legal Aid and Advice Act, 1949. I can find nothing which supersedes, or which in any way nullifies, the present effect and validity of rule 65 of the Matrimonial Causes Rules, 1950. Therefore, I find myself in agreement with the judgment which Barnard J. delivered in

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[12] [1951] P. 156.

[13] Ibid. 160.

Vincent v. *Vincent*,[14] to which my Lord has referred. Barnard J. there pointed out that in *Conway* v. *Wimpey (George) & Co. Ld.*[15] this court was considering a situation to which Ord. 58, r. 15 (2), applied, and it was from that rule that the expression "special "circumstances" came. It follows, therefore, that rule 65 is operative, and that the power to make an order for security under that rule remains and survives, even though the parties are assisted persons. But it is of great consequence to have in mind the concluding words used by Barnard J., to which my Lord has drawn special attention. They form a guide and are a pointer to the view which I think must have been held by the judge as to what is likely to happen in cases of this kind.

We were also referred to the decision of the Court of Appeal in *Jackson* v. *John Dickinson & Co. (Bolton) Ld.*,[16] in which the plaintiff, who was ordinarily resident abroad, claimed, as an assisted person, damages for personal injuries. The defendants applied for an order for security for costs. It was held that the fact that the plaintiff was an assisted person did not disentitle the defendants from obtaining an order for security.

Mr. Kenneth Jones referred, in the course of his submissions, to the provisions of section 2 (2) (*e*) of the Legal Aid and Advice Act. [His Lordship read section 2 (2) (*e*) and continued:] Mr. Kenneth Jones quite correctly pointed out that that shows that though a party is an assisted person, if due regard is had to that fact and to all the circumstances, there may be an order for costs made against him. In the present case we have been definitely told that the only material which was before the registrar was the civil aid certificate. Mr. Kenneth Jones submitted that, in spite of the terms of that certificate, the assisted person might have had some resources. He pointed, for example, to paragraph 6 of Sch. II of the Legal Aid (Assessment of Resources) Regulations, 1950 (No. 1358): [His Lordship read the regulation.] So, Mr. Kenneth Jones argued, "The husband "may have had up to £20," and he pointed to other contingencies or possibilities. It seems to me, however, that all that is pure speculation and that, in a case in which the only material before the registrar was what was contained in the civil aid certificate, there would be no material on which the registrar could make his order.

It might well be that the effect of that order would be to prevent the assisted person from proceeding with his petition.

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[14] Ante 13.

[15] [1951] 1 T.L.R. 215.

[16] [1952] W.N. 9.

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Morris L.J.

There is the usual stay pending the provision of security, but unless the petitioner could find the £20, he might never be able to proceed.

I agree fully with all that my Lord has said, and, on the facts of this case, it seems to me there was not sufficient material on which the registrar could make the order which he made. I concur with the order proposed by my Lord.

Appeal allowed.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co., for Bosley & Co., Brighton; Gates & Co., Brighton.*

E. D.

C. A.

COLLINS *v.* COLLINS.

1952
Oct. 27, 28; *Dec.* 1.

Singleton and Morris L.JJ.

Divorce—Practice—Damages—Order directing how they are to be paid or applied—Invested for benefit of child of marriage—No provision in case of death of child before 21*—Further application—Jurisdiction—Form of order in favour of infant—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 30 (3)*—To include provision for payment out to him on or after attaining age of* 21*—Assimilation to practice of Queen's Bench Division.*

A petitioning husband was granted a decree absolute for the dissolution of his marriage on the ground of the adultery of his wife, and the named co-respondent was ordered to pay £2,500 damages. On an application by the petitioner, Langton J., acting under section 189 (3) of the Judicature Act, 1925, ordered that, of the £2,500 damages paid into court, £500 should be paid out to the petitioner, and that the balance be invested for the benefit of the infant child of the marriage. There was no provision in the order as to what was to happen in the event of the infant dying before he reached 21 years of age, or for payment out of the fund on or after the infant reaching the age of 21 years.

The infant died at the age of 19, and on a summons taken out by his father, the petitioner, Pearce J. directed that the order of Langton J. should be varied and the sum of £2,000 lodged in court for the benefit of the infant child of the marriage be re-apportioned to the petitioner and paid out of court to him, he undertaking to meet any just lawful claims against the infant and his estate up to the amount paid out. The respondent (the petitioner's former wife) appealed, contending that Pearce J. had no jurisdiction to make the order and that the fund in court was money belonging to the infant which, by reason of section 46 (1) (iii) of the Administration of Estates Act, 1925, should be held in trust for the father and mother of the deceased in equal shares absolutely:—

Held, that no question arose as to the intestacy of the infant with regard to the fund. It was not a case of apportionment or of varying the order of Langton J.; it was simply a case of the petitioner, when the order of Langton J., made in 1935, did not fully deal with the matter, applying under section 30 (3) of the Matrimonial Causes Act, 1950, the successor of section 189 (3) of the Act of 1925, for the court's direction as to the manner in which the damages recovered were to be applied. Pearce J. had jurisdiction to make the order, and the order he made was in accordance with justice.

Per curiam: (1) Had there been an intestacy in regard to this fund, it would not have been a bar against the mother that the fund had been supplied by damages paid by the co-respondent in respect of her adultery.

(2) Orders made under section 30 (3) of the Act of 1950, when it is intended that the infant should possess the capital on or after attaining his majority, should include a provision that the fund should be paid out to the infant on or after he had attained the age of 21 years, thus saving the cost of another application to the court, and assimilating the practice to that of the Queen's Bench Division.

Appeal from an order of Pearce J. made in chambers on October 2, 1952. The appeal was heard by consent of the parties before two judges.

The two parties, a former husband and wife, had been married in 1927 and there was one child of the marriage, a boy. In October, 1935, the husband was granted a decree absolute for the dissolution of the marriage on the ground of the wife's adultery with a named co-respondent, who was condemned in damages to the amount of £2,500. On the application of the petitioner on November 18, 1935, Langton J., acting under section 189 (3) of the Judicature Act, 1925,[1] ordered: "Upon hearing counsel for "the petitioner and co-respondent and reading the petitioner's "affidavit . . . I do order that of the sum of £2,500 herein "paid into court £500 be paid out to the petitioner and that "the balance be invested for the benefit of the child by the "Accountant-General in manner specified in the payment

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[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 189 (3): "The "court may direct in what manner the "damages recovered on any such petition are to be paid or applied, and "may direct the whole or any part "of the damages to be settled for the "benefit of the children, if any, of "the marriage, or as a provision for "the maintenance of the wife."

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"schedule signed by the registrar. Certificate for counsel. "Liberty to apply."

It appeared that the co-respondent had agreed to pay a sum of money weekly to the respondent. The payment schedule dealing with the sum of £2,000 had in the left-hand column: "Invest the sum of £2,000 in 3½ per cent. War Stock in the "name of Charles William Michael John Collins, an infant, born "August 2, 1932. Pay the interest during the minority of the "said infant to Charles Clifford Collins," that was, the petitioner, who was looking after the boy and supporting him.

When only 19 years of age Charles William Michael John Collins was killed in a motor accident. Thereupon the petitioner took out a summons under section 30 (3) of the Matrimonial Causes Act, 1950, "to vary" the order of Langton J. made on November 18, 1935.

Pearce J. ordered that the order of Langton J. "be varied "and the sum of £2,000 lodged in court for the benefit of Charles "William Michael John Collins, the child, issue of the marriage "between the petitioner and the respondent, be re-apportioned "to the petitioner and that the said sum be paid out of court to "the petitioner, the petitioner undertaking to meet any just "lawful claims against the infant and his estate up to the "amount paid out. Liberty to petitioner or respondent to "apply." Owing to the fall in the value of securities and the deduction of costs the sum to be paid out to the petitioner would be less than £2,000.

The respondent appealed.

J. R. Bickford-Smith for the respondent. The son of the marriage died intestate. The £2,000, the subject of the order of Langton J., was the son's property. If there were any power for the court to re-apportion the sum, it ceased as soon as the property vested in the personal representatives of the son. Upon the grant of administration, the title of the representatives relates back to the time of death. Once the property was settled by Langton J., it could not be settled again. Compare terms of analogous cases; section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and section 14 (1) of the Administration of Justice (Miscellaneous Provisions) Act, 1938. The sole ground on which the petitioner rested his case before Pearce J. was that it was wrong that the wife should benefit by her own wrongdoing, since this sum came from damages paid by the co-respondent in respect of her adultery. But the title of the wife rests on the absolute interest which was given to the child by the order of Langton J. Compare the case of moneys paid into court for an infant in respect of a claim under the Fatal Accidents Acts: see R.S.C., Ord. 22, r. 14. The order of apportionment made by Langton J., once made, was final. It is too late now to alter the order: see *Taylor* v. *Taylor.*[2] Pearce J. had no jurisdiction to vary the earlier order of Langton J. Under the order of Langton J. this fund belonged to the respondent's son and, since there was an intestacy, under the Administration of Estates Act, 1925, s. 46 (1) (iii), the fund should be held in trust for his father, the petitioner, and his mother, the respondent, in equal shares absolutely. [*Narracott* v. *Narracott*[3] was cited.]

G. H. Crispin for the petitioner. It is submitted that the provision of the order of Langton J. was not that the son of the marriage took an absolute interest in this sum of £2,000. The sum was to be invested in his name and the interest was during his minority to be paid to the petitioner. There was no provision as to what was to happen to the money in case of his death before he reached the age of 21, and it appears that in the view of the Accountant-General payment to the infant on attaining his majority could only be made if another order of the court were obtained. The infant had no absolute interest in the fund. In *Clark* v. *Clark and Bouck*[4] the Judge Ordinary directed that all the petitioner's interest in the damages be assigned by him to a trustee for the use of the only child of the marriage and, in case of the child's death under 21 and unmarried, for the use of the petitioner. That was in accordance with the old practice where there was a settlement and the practice should be and is the same where under the modern practice a fund is invested for the child under an order of the court. The decision of Langton J. does not dispose of the corpus of the fund. If it did, then, as appears from *Forster* v. *Forster*,[5] in special circumstances variation in the apportionment made may be ordered. Pearce J. certainly took the view that he retained jurisdiction over this fund and that the order of Langton J. was not final in that it was not complete. The petitioner could have gone back to the court in the lifetime of his son to ask for a re-apportionment of the fund.

His Lordship found that the fund never vested in the infant and therefore the fund was not subject to the provisions of the Administration of Estates Act, 1925, on his death intestate.

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[2] (1926) 161 L.T.J. 236.

[3] (1865) 4 Sw. & Tr. 76.

[4] (1861) 2 Sw. & Tr. 520.

[5] (1865) 4 Sw. & Tr. 131.

Secondly, he held that the petitioner was entitled to apply to the court for a re-apportionment of these damages, taking the view that that was no finality in the order of Langton J. In the alternative the infant's vested interest was conditional on his attaining his majority.

Pearce J. had jurisdiction to make the order against which the respondent has appealed and he has done justice in the exercise of his discretion. It would be inequitable that the respondent wife should receive any part of this fund of damages paid into court by the co-respondent in respect of the respondent's adultery.

J. R. Bickford-Smith in reply. If the infant had survived to attain his majority, then, if an order of court were necessary for the payment out to him of the corpus of this fund, such an order was one of mere machinery. [*In re Embleton* [6] was mentioned.]

Cur. adv. vult.

SINGLETON L.J., after referring to the facts leading to the division of the damages, continued:—Under section 33 of the Matrimonial Causes Act, 1857, the court was granted power "to "direct in what manner such damages shall be paid or applied, "and to direct that the whole or any part thereof shall be settled "for the benefit of the children (if any) of the marriage, or as a "provision for the maintenance of the wife." That was the first time provision was made under which the court was enabled to take control of the amount of damages awarded to a petitioner. Though the court took control, the damages were virtually damages awarded to the petitioner. The position was later regulated by section 189 (3) of the Judicature (Consolidation) Act, 1925, and the order of Langton J. was made under this subsection. This provision was repealed by section 34 (1) and re-enacted by section 30 (3) of the Matrimonial Causes Act, 1950.

Mr. Bickford-Smith, in opening this appeal, spoke of that which had been done by Langton J. as an apportionment of the damages. Strictly, I do not think that that is the right term to apply. The words of section 189 (3) are: "The court may "direct in what manner the damages recovered on any such "petition are to be paid or applied, and may direct. . . ."

The order of Langton J., as I pointed out to Mr. Crispin, does not correspond precisely with the endorsement on the summons made by Langton J. 17 years ago. I am not sure that the difference is very material, but I draw attention to it because I think that the orders as drawn up, of which copies are supplied, ought to be in the terms stated by the judge and endorsed by him on the summons; and, moreover, the parties ought to have the opportunity of pointing out any mistake, if they wish to do so.

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[6] (1946) 175 L.T. 451.

That order was made upon an affidavit of the petitioner, who had desired that £1,500 of the damages should be invested for the benefit of the child in such manner and upon such trusts as the court might direct. A change took place in the amount, and the order which was made dealt with the sum of £2,000, which was to be invested for the benefit of the child in manner specified by the payment schedule. I think it is quite likely, judging by the order of Langton J. and the provision in the payment schedule as to investing the money in the name of the infant, that the intention of Langton J. was that the money was to be the boy's money; but the order does not provide, nor does the payment schedule provide, as to what shall be done when the boy reaches the age of 21, nor does it provide what shall happen if he dies before he reaches that age. Most unfortunately the boy, Charles William Michael John Collins, was killed in a motor accident when he was 19 years of age. Thereupon the father took out a further summons, which was heard before Pearce J., the father seeking to vary the order of Langton J. made 17 years earlier.

It was argued by Mr. Bickford-Smith on the hearing of this appeal that there could not be any such variation, though it seems doubtful whether that point was taken before Pearce J., who, having heard the application, ordered: "That the order of "Langton J., dated November 18, 1935, be varied and the sum "of £2,000 lodged in court for the benefit of Charles William "Michael John Collins, the child, issue of the marriage between "the petitioner and the respondent, be re-apportioned to the "petitioner and that the said sum be paid out of court to the "petitioner, the petitioner undertaking to meet any just lawful "claims against the infant and his estate up to the amount paid "out. Liberty to petitioner or respondent to apply." I would point out that there is not the sum of £2,000 remaining. Owing to the fall in the value of securities there was a good deal less at the time the summons was heard, and, of course, there is considerably less after costs have been paid out of the fund. What Pearce J. intended, I have no doubt, was that the balance of the fund should be paid out to the petitioner. The wife appeals to this court against the order of Pearce J.

It was pointed out that, in the event of the claim of the respondent succeeding, she would be receiving damages which

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the co-respondent paid into court as a result of her adultery, and that that would hardly be right. The case for the respondent was that the money was the boy's; that there was an intestacy, and that therefore as the boy died intestate with both parents living, the residuary estate of the intestate should be held in trust for the father and mother in equal shares absolutely.

Mr. Bickford-Smith, on behalf of the respondent, submitted that that is how this case should end. It may well be said that she would not be getting money through her own adultery, but by reason of the death of her son who had some property. Mr. Crispin, on behalf of the petitioner, submitted that the money was not the boy's money at all; that the court had made an order under section 189 (3) of the Judicature (Consolidation) Act, 1925, which was not in any sense a final order, and he submitted it was open to the court under the similar subsection in the Act of 1950 to make an order dealing with part of the fund, or to deal with the fund up to a particular date, and then to make another order thereafter. He submitted, indeed, that this was not an apportionment, but that the court under the subsection had power to direct, and to direct from time to time, what should be done in the events which had happened.

We thought it right to obtain some information from the Accountant-General as to what the position is in cases of this kind, and certain questions were put to him which he was good enough to answer. The one which is most material is the eleventh question, which was this: "Is the order of Langton J. "(coupled with the payment schedule) in common form? If "so, what is the practice as to payment out if, and when, the "infant attains the age of 21 years?" The Accountant-General answered that question in this way: "The payment schedule to "the order of November 18, 1935, was in the usual form so far "as divorce matters are concerned. As a result, payment out "on majority can only be made if another order of court is "obtained. The Accountant-General would prefer that the first "order directing investment of damages allocated to infants "should also provide for payment out on or after the date the "infant attains the age of 21 years. This is the agreed practice "in all cases of Queen's Bench infants."

I quite agree that the Accountant-General's desire that the first order directing the investment of damages allocated to infants should provide for payment out on or after the infant attains the age of 21 years. I see no reason why there should be a distinction between the practice in two Divisions of the

High Court. Of old these matters were often carried out by means of a settlement or settlements, and the Judge Ordinary in *Clark* v. *Clark and Bouck* [1] directed on a motion to make the decree absolute and to direct application of damages, that all the petitioner's interest in the damages be assigned by him to a trustee for the use of the only child of the marriage, and in case of the child's death under 21 and unmarried, for the use of the petitioner, and suspended the decree till such assignment was made. That was in accordance with the old practice. Nowadays the money is usually invested for the child or children under an order of the court instead of there being a settlement.

In the Queen's Bench Division the order which is made includes an order for payment out when the infant attains the age of 21 years. The payment out then is but a matter of formality on proof that the child is alive.

I am inclined to think that when the judge made the order in the year 1935 he thought that the money was to be the child's money, or else he would not have directed that it was to be invested in the name of the child.

It is claimed on behalf of the petitioner that the order is at large, and that in such a case anyone interested can appear before the judge on an application if the child attains the age of 21 years, and ask that the money should be paid out to someone else, for example, to the petitioner, who might have changed his mind if the child was living with the mother. Those alterations could be made, it is claimed, under section 30 (3) of the Matrimonial Causes Act, 1950. It may be that they could, but I shudder at the idea of a parent who has agreed to a fund going to his child, appearing before a judge on a summons in a case such as this when the child has attained the age of 21 years and saying: "Oh, give me the money; I have changed my mind." In any event, there is on the order as drawn up the necessity for a further summons before a judge when the child attains 21 years of age, and that involves some expense. It is for those reasons that I agree with the Accountant-General's wish that the practice should be changed.

Further, there is no provision in the order of 1935 for what is to happen if the infant should die under the age of 21 years—no provision such as there was in the old practice where there was a settlement. I cannot see why such a provision should not be inserted in the order. True, it is for the party asking for the order to say what he wants, but there ought to be a regular practice in these matters, and the natural course would be to provide what should be done with the fund in the event of the child dying before he or she reaches 21 years of age. The damages were awarded to the petitioner, and provision might well have been made for the fund to be transferred to him if the child died under the age of 21 years. I feel that the practice of the Queen's Bench Division is both simpler and less costly.

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[1] 2 Sw. & Tr. 520.

I have reached the conclusion that the order of Pearce J. is right and is in accordance with justice. I think that by reason of the terms of section 30 (3) of the Matrimonial Causes Act, 1950, it is open to the petitioner in the circumstances to come before the court and to ask the court to direct what shall be done with the damages which are in court. The order of Langton J. was that the money was to be invested for the benefit of the child by the Accountant-General in manner specified in the payment schedule, and the payment schedule provided that the income from the money was to be paid to the father during the child's minority. There is no further provision. The result is that no question as to intestacy arises. It is simply a case in which the order of 1935 did not deal fully with the matter. In the events which have happened it is proper for the petitioner to apply to the court to direct within the words of the subsection what shall be done. It is not a case of "varying" or of "re-apportioning"; it is a case of asking for the court's direction in what manner the damages recovered are to be paid or applied. I treat the summons as having asked for that. Pearce J. decided that the money should be paid to the petitioner, he undertaking to meet any just lawful claims against the infant and his estate up to the amount paid out. I am satisfied that Pearce J. had power to make that order, and, moreover, that it is in accordance with justice. As this money was part of the damages awarded to the petitioner, it would scarcely appear to be right that the respondent should receive any part of it; none the less, that would not act as a bar against her if there was an intestacy in regard to the fund. For the reasons I have given, I do not think that there was.

In my view, this appeal should be dismissed.

MORRIS L.J. I agree.

Appeal dismissed.

Solicitors: *William A. Crump & Son; Denton, Hall & Burgin, for Herbert Simpson, Son & Bennett, Leicester.*

C. G. M.

TINDALL *v.* TINDALL.

C. A.

1952
Oct. 31;
Nov. 10, 11;
Dec. 17.

Singleton, Birkett and Morris L.JJ.

Nullity—Marriage not consummated—Incapacity of husband—Wife, knowing facts and law as to nullity, brings proceedings before justices—Desertion by husband and his persistent cruelty alleged—Summons dismissed—Appeal—Husband ordered to give security for costs—Appeal dismissed—Husband's petition for divorce on ground of desertion—Wife, by answer, prays for decree of nullity—Approbation of marriage by wife—Public policy.

The parties, husband and wife, were married in December, 1946, and lived at the wife's mother's house. On September 13, 1947, the wife's solicitor wrote to the husband at that house stating that he was instructed to commence proceedings for nullity on the ground that the husband was incapable of consummating the marriage and asking the husband to vacate the rooms he occupied at once. The husband left the house forthwith. On October 9, 1947, the wife issued a summons, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, against her husband before justices alleging desertion and persistent cruelty on his part. The summons was adjourned and eventually, on July 14, 1950, dismissed. The wife appealed, obtaining an order for the husband to pay into court a sum for security for costs, which was obeyed. The wife's appeal was dismissed.

In August, 1951, the husband petitioned for divorce on the ground of his wife's desertion. The wife, by her answer, alleged that the marriage had never been consummated through the incapacity of her husband, and she prayed for a decree of nullity. The trial judge found that the marriage had not been consummated through the husband's incapacity, and on that issue the Court of Appeal affirmed his decision:—

Held, that the wife had, with knowledge of the facts and the law as to nullity—that she had a remedy and what it was—put forward a case before the justices, the foundation of which was her marriage, and had persisted in that claim on appeal, and that in those circumstances there had been a recognition by her of the marriage in circumstances which made it inequitable as between the parties and, from a public point of view, unseemly, to entertain the wife's prayer for a decree of nullity.

If the words "public policy" in Lord Watson's speech in *G.* v. *M.* (1885) 10 App.Cas. 171, 198; 1 T.L.R. 326, were to be given their ordinary meaning, they applied to this case.

Per Singleton L.J. There can be approbation of the marriage by a spouse without the taking of pecuniary advantage, as the speech of Lord Selborne L.C. in *G.* v. *M.*, supra, shows, but it would seem that the obtaining of an order for security for costs might be said to have been a pecuniary benefit for the wife.

G. v. *M.*, 10 App.Cas. 171, followed.

Decision of Havers J. reversed.

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APPEAL from a judgment of Havers J., delivered at Leeds Assizes.

The parties, husband and wife, William and Muriel Tindall, were married on December 18, 1946. The husband was a trawler hand and spent most of his time at sea. They lived at the house of the wife's mother. In September, 1947, the wife consulted a solicitor, who wrote, on her instructions, a letter dated September 13, 1947, which the husband received while he was still living in the same house. The letter read: "Dear Sir, I have been "consulted by your wife with regard to your domestic relationship. If my instructions are correct, it is clear to me that you "are incapable of consummating the marriage, and I am "instructed to commence proceedings for nullity of the marriage "forthwith. I must therefore ask you to vacate the rooms you "occupy at once. I shall be glad to know what proposals you "have for the maintenance of my client and her two children "[by a previous marriage] for whom you are responsible. As "the matter is of considerable urgency it must be attended to by "return of post. Yours truly, (signed) A. V. Dickinson."

That letter was addressed to Mr. Tindall at the house of his mother-in-law at which he was living at the time. He packed up and left forthwith. He consulted a solicitor, but no answer was made to the letter. On October 9, 1947, the wife issued a summons against her husband in the justices' court at Hull, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, in which she alleged desertion and persistent cruelty. The summons was adjourned for some reason, and it was not finally heard until July 14, 1950. The justices dismissed the complaint and set forth their reasons for so doing in clear terms. On the desertion issue the wife relied on two letters which she said she had written to the husband—he denied having received them—in which she sought a reconciliation with him. The dates on the copies produced by the wife were February 9, 1949, and January 6, 1950. The justices did not regard them as containing bona fide offers to resume cohabitation.

On July 26, 1950, the wife gave notice of appeal to the Divisional Court. An application was made that her husband should provide security for the costs of her appeal, and an order was made on August 15, 1950, that he should lodge in court the sum of £15 as security. He did that on, or before, September 6, 1950. The wife's appeal was heard before Lord Merriman P. and Wallington J. on January 11, 1951, and it was dismissed.

The President said: "Before I leave the persistent cruelty I "ought to mention that there never has, in fact, been a nullity "suit, and we know that about four weeks after the writing of "this letter of September 13, 1947, the same solicitors took out "a summons for persistent cruelty and desertion. I do not want "to attach too much weight to the inconsistency, to the decision "at one moment to reprobate the marriage and the next moment "to approbate it by making a charge of cruelty, but I do think "it is a little important to bear in mind what happened after"wards."

The next step was that the wife's solicitors on February 21, 1951, wrote this letter to the husband's solicitors: "Our client "has consulted us with regard to the question of reconciliation "with her husband. She would have written to your client per"sonally, but it will be remembered that in the proceedings "which have taken place your client stated that he never received "the letters from our client and so she wishes the correspondence "to go between the solicitors in order to make sure that he does "receive the message which she wishes to send him. Our client "is most anxious that there should be a reconciliation between "the parties. We appreciate that it is not altogether satisfactory "that this approach should be made by means of a solicitor's "letter, but if your client is prepared to meet our client at any "reasonable rendezvous she would like to discuss the matter with "him in the hope that he will consent to resume cohabitation. "If you or your client think that a probation officer would assist "in this effort then our client has no objection and would indeed "welcome the presence of a probation officer for this purpose. "Your early reply will oblige. Yours faithfully," (signed) "Pearlman & Rosen."

That was answered on March 14, 1951: "Dear Sirs, We have "your letter of the 21st ultimo, in this matter upon which we "have taken our client's instructions. You will not be surprised, "we think, having regard to the cruel and untrue allegations "made and persisted in by your client, if in the circumstances "our client regards the offer as not being bona fide. Our client "regards the offer as an attempt to forestall divorce proceedings, "based on desertion which he is proposing to take when he "receives a legal aid certificate for which he has already made "application. Yours faithfully," (signed) "Williamson, Stephen"son & Hepton."

There had been a change of solicitors acting for the wife before the hearing before the justices, but it was clear from what took place there that the second firm of solicitors acting for the wife knew of the letter of September 13, 1947, in which proceedings for nullity were threatened.

The husband, on August 13, 1951, petitioned for a decree of divorce alleging that his wife had deserted him. The wife by her answer filed on November 1, 1951, alleged that the marriage had never been consummated, and that her husband was incapable of consummating it, due to physical, neurotic or hysterical disorder, and she prayed for a decree of nullity. She denied desertion, and set up, in the alternative, claims to relief which are not material to this report. In accordance with the established practice of the court, the issue as to nullity was heard first. Havers J., on June 23, 1952, held that the marriage had not been consummated, and that the non-consummation was due to the incapacity of the husband. Accordingly, he dismissed the petition and granted the wife's prayer in her answer that the marriage should be declared null and void.

The husband appealed.

A. W. Stephenson for the husband [having contended (1) that there was no evidence or no sufficient evidence on which Havers J., the trial judge, could find that the marriage was not consummated and that this was due to the incapacity of the husband; (2) that in cases of this kind it was desirable that there should be corroboration of the evidence of the party alleging incapacity even if that were not necessary, and (3) that there was here no such corroboration, citing *Hodgkins* v. *Hodgkins*,[1] continued]:

There was here a recognition of the existence and validity of the marriage by the application of the wife to the justices alleging desertion and persistent cruelty on the part of her husband, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, by her appeal from their decision to the Divisional Court and by her application for security for costs to be given by the husband on the appeal, so as to render it most inequitable and contrary to public policy that she should be allowed to challenge the marriage: see *G.* v. *M.*,[2] and more especially the speech of Lord Watson.[3] Every action the wife has taken, with the exception of instructing her solicitor to write the letter of September 13,

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[1] [1950] P. 183; [1950] 1 All E.R. 619.

[2] (1885) 10 App.Cas. 171; 1 T.L.R. 326.

[3] 10 App.Cas. 197–8.

1947, to her husband has been inconsistent with a claim for nullity upon this ground.

Ernest Ould for the wife. It is plain from *G.* v. *M.* that the doctrine, designated as that of " want of sincerity," is not to be further extended. As is stated in the headnote to that case: " Delay in raising a suit of nullity on the ground of impotency is " a material element in the investigation of a case which upon " the facts is doubtful; but there is no definite or absolute bar " arising from it." There is no standard definition of " approbation " or of " insincerity "; its limits remain unspecified. All that can be said is that it connotes some kind of conduct on the part of the petitioner for nullity which would make it an affront to the public conscience that in the particular circumstances of her case she should be granted that for which she asks. Want of sincerity should be pleaded, but a party may rely on it without doing so: *R. E. L. (orse. R.)* v. *E. L.*[4] If this issue had been pleaded the wife might have put evidence on that issue before the court. *W.* v. *W.*[5] was a very different case from this, for there in adopting the child the wife was taking on the responsibilities of a married parent.

To constitute approbation it should be ascertained what is in the mind of the party who is said to approbate: see the speech of Lord Selborne L.C. in *G.* v. *M.*[6] Evidence of that is absent in this case. If the wife had appreciated what she was doing, it may well be that she approbated the marriage. But that cannot be found without the court knowing the state of mind of that party. In most of the authorities delay was the ground on which this defence was put forward: see passages from the speeches in *G.* v. *M.*[6] cited in *Nash* v. *Nash.*[7] That the wife was aware of her husband's condition before marriage was no absolute bar to the granting of a decree of nullity: *J.* v. *J.*[8] There was nothing in the facts of this case which could be described as an affront to the public conscience. In *Clarke* v. *Clarke*[9] Pilcher J. said: " The so-called doctrine of approbation was fully dealt with, " explained and to some extent exploded by Lord Selborne L.C. " in *G.* v. *M.*[10] " See the observations on " insincerity " of

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[4] [1949] P. 211; 65 T.L.R. 88; [1944] 1 All E.R. 141.

[5] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.

[6] 10 App.Cas. 171, 186, 197, 201.

[7] [1940] P. 60, 61–5; 56 T.L.R. 274; [1940] 1 All E.R. 206.

[8] [1947] P. 158; [1947] 2 All E.R. 43.

[9] [1943] 2 All E.R. 540, 545.

[10] 10 App.Cas. 171.

Langton J. in *Nash* v. *Nash*,[11] and also *W.* v. *W.*[12] and *Clifford* v. *Clifford*.[13]

The following facts, which appear from the evidence, are in the wife's favour: (1) Although the parties were married for nine months, before the husband left the matrimonial home, they were only together for 21 days. (2) From the time her husband left her the wife had no money from him. (3) The wife's application to the court was adjourned from October, 1947, and the summonses would not have been brought to life again but for the action of the National Assistance Board. (4) The wife did not get any benefit from the proceedings she took before the magistrates. (5) There was no evidence that the wife appreciated the significance of her revival of the proceedings before the magistrates. No question of estoppel arises here. No doctrine of estoppel can operate against a party so as to abrogate the statutory duty of the Divorce Court to inquire into the truth of a petition which is properly before it.

A. W. Stephenson replied.

Cur. adv. vult.

December 17, 1952. The following judgments were read:—

SINGLETON L.J. As to the first point taken for the husband, I am unable to see that this court can interfere with the judge's findings of fact. He saw and heard the witnesses, and he felt himself able to accept the wife's evidence, which he regarded as corroborated to some extent by the evidence of her mother. Whether the evidence of the mother can strictly be regarded as corroboration of the wife's evidence as to impotence may be arguable, but it is right to say that, if it is accepted, it makes it more probable that some part of the evidence of the wife is true than is that of the husband, and it points to untruthfulness on the part of the husband. This is not conclusive by any means, and the case for the wife was not a strong one. Upon reading the transcript, I am not sure that I should have arrived at the conclusion which was reached by Havers J. There were many difficulties in the way of the wife. She had been married before, and she had two children. I find it extraordinarily difficult to understand her letters, and her actions, if her evidence on the

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[11] [1940] P. 60, 69; 56 T.L.R. 274; [1940] 1 All E.R. 216.

[12] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.

[13] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394.

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question of impotence be right. She had been disbelieved by the justices at Hull on her cruelty and desertion charges on July 14, 1950, and her appeal to the Divisional Court had failed. Still, the question was one for the determination of the trial judge, and he was in a far better position to form a view upon it than is this court. This ground of appeal fails.

As to the second ground of appeal, the principle on which counsel for the husband relied is perhaps most clearly stated by Lord Watson in *G.* v. *M.*[1]: "I think that when those cases are "dissected they do show the existence of this rule in the law of "England, that in a suit for nullity of marriage there may be "facts and circumstances proved which so plainly imply, on "the part of the complaining spouse, a recognition of the "existence and validity of the marriage, as to render it most "inequitable and contrary to public policy that he or she should "be permitted to go on to challenge it with effect. If that be, "as I am inclined to think it is, the rule of the law of England, "I have no hesitation in saying that it is a rule which prevails in "Scotland also."

Lord Selborne L.C. dealt with the matter this way[2]: "I "think I can perceive that the real basis of reasoning which "underlies that phraseology is this, and nothing more than this, "that there may be conduct on the part of the person seeking "this remedy which ought to estop that person from having it; "as, for instance, any act from which the inference ought to be "drawn that during the antecedent time the party has, with a "knowledge of the facts and of the law, approbated the "marriage which he or she afterwards seeks to get rid of, or "has taken advantages and derived benefits from the matrimonial "relation which it would be unfair and inequitable to permit him "or her, after having received them, to treat as if no such relation "had ever existed. Well now, that explanation can be referred "to known principles of equitable, and, I may say, of general "jurisprudence. The circumstances which may justify it are "various, and in cases of this kind many sorts of conduct might "exist, taking pecuniary benefits for example, living for a long "time together in the same house or family with the status and "character of husband and wife, after knowledge of everything "which it is material to know. I do not at all mean to say "that there may not be other circumstances which would

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[1] 10 App.Cas. 171, 197–8; 1 T.L.R. 326.

[2] Ibid. 186.

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"produce the same effect; but it appears to me that, in order to "justify any such doctrine as that which has been insisted upon "at the bar, there must be a foundation of substantial justice, "depending upon the acts and conduct of the party sought to be "barred. Further than that I do not think it necessary for the "purpose of this case to go."

And Lord Bramwell said[3]: "In my opinion a man who has "inflicted this cruel wrong upon a woman ought not to be heard "to object to her complaining, when she comes forward with her "complaint of this wrong that he has done her, unless in some "way or another he can show that he sustains some injury from "the double matter of her not having complained earlier, and of "her complaining now."

It is seldom that the courts have applied this doctrine so as to deprive a party of a decree of nullity when impotence has been proved. Quite recently this court did apply it in *W.* v. *W.*,[4] and there is mentioned, at p. 202 of the 14th edition of Mr. Latey's work on Divorce, *R.* v. *R.*, an unreported case in which Sir Boyd Merriman P. applied it in the year 1934, a decision which was approved in the Court of Appeal. In *Clarke* v. *Clarke*,[5] Pilcher J. spoke of "the so-called doctrine of 'appro-"'bation,'" which, he said, had been to some extent exploded by Lord Selborne L.C. in *G.* v. *M.*[6]

In considering the matter it is necessary to have regard to the nature of the proceeding. The jurisdiction which is being exercised is that which before January 1, 1858, was administered by the Ecclesiastical Courts. The Judge Ordinary, Sir J. P. Wilde, in *A.* v. *B. and Another*,[7] said: "But impotency has "always hitherto been considered in the Ecclesiastical Courts "(and, since their abolition, in the Divorce and Matrimonial "Court), as a matter of personal complaint only. I do not find "the principle of the court's interference to annul such a mar-"riage anywhere distinctly set forth. Its original exercise was, "it is likely enough, mixed up with the interests of those who "asserted the jurisdiction. But I conceive that it has a sound "basis of justice in the consideration that the party complaining "was, though perhaps unintentionally, deceived in the contract, "and ought not to be bound by it. On whatever ground it is "rested—this much, at least, is clear—that it has been and is "always dealt with as a matter of personal complaint and

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[3] 10 App.Cas. 171, 202.

[4] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.

[5] [1943] 2 All E.R. 540, 545.

[6] 10 App.Cas. 171.

[7] (1868) L.R. 1 P. & M. 559, 562.

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"grievance; and that it has been so dealt with is apparent from "the fact that the courts have been in the habit of requiring "many conditions to be fulfilled before they would grant relief, "all of which are inconsistent with the notion that the marriage "is absolutely void. Thus the party complaining must be "sincere in the ground on which he is asking relief; there must "be no unreasonable delay, and the defect must be incurable."

And I derive help from the judgment of Hill J., in *Woodland* v. *Woodland.*[8] The headnote reads as follows: "A decree for "restitution of conjugal rights with the usual finding that the "parties to the suit are husband and wife, though it may not "directly affect their status, nevertheless proceeds upon the basis "of their status being thus conclusively established inter partes. "A respondent in a suit for restitution of conjugal rights, who "does not resist such a finding, cannot afterwards dispute the "validity of the marriage of the parties. A subsequent suit "for nullity of the marriage, in which bigamy is alleged to have "been in fact committed by one of the parties to it, does not "after this finding of its validity as between them afford any "exception to the general rule of estoppel."

I refer also to this passage in the judgment[9]: "No doubt in "some respects the questions which arise under a contract of "marriage are different from questions which arise under other "contracts, but I have listened to the arguments and attended "to the cases that have been cited, and I am unable to find "that there is anything in the law peculiar to this Division which "renders the general law of estoppel inapplicable to this case"; and to another[10]: "The marriage was directly in issue in the "proceedings for restitution. It was actually decided by the "court, and the court could not have made a decree without "finding that it was a valid marriage. It appears from the "judgment itself to be the ground upon which it was based; there "was a finding that they were lawful husband and wife. I can "see no reason for saying that, because this was a marriage "contract, I am to refuse to apply the principles laid down in "the cases several of which have been cited to me."

The position seems to be this. It is not in every case in which non-consummation of the marriage through impotence is proved that a decree of nullity will be granted. There may be conduct on the part of the one seeking the remedy which ought

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[8] [1928] P. 169; 44 T.L.R. 495.
[9] [1928] P. 169, 172.
[10] Ibid. 173.

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to estop him or her from having it. Lord Selborne L.C. gave as instances: (a) approbation of the marriage with a knowledge of the facts and of the law; and (b) cases in which the one seeking the remedy had, with the like knowledge, taken advantages and derived benefits from the matrimonial relation, so that it would be unfair and inequitable to permit him or her, after having received them, to act as if no such relation had ever existed; and he added that in order to justify the doctrine there must be a foundation of substantial justice depending upon the acts and conduct of the party sought to be barred. Lord Watson added the element of public policy.

In the present case it is clear that the wife must be regarded as having knowledge of the facts and of the law; and I treat knowledge of the law for this purpose as knowledge that she had a remedy, and what the remedy was. [His Lordship stated the facts of the case and continued:] The case for the appellant husband was that there was conduct on the part of the wife which showed approbation of the marriage. She clearly knew the facts and the law, it was said, and with that knowledge she put forward a case before the justices the foundation of which was the marriage, as the complaint showed. She sought to obtain an order against the appellant to which she could only be entitled if he was her husband, and she persisted in that claim by way of appeal to the Divisional Court; and in three letters, two before and one after those proceedings, she showed the same spirit.

I see no answer to this argument. If ever a party to such a suit did approbate the marriage surely this wife did. It seems to me that her conduct is within the words of Lord Selborne L.C. in his speech in *G.* v. *M.*[11] which I have read. And, further, if the words "public policy" in Lord Watson's speech are to be given their ordinary meaning, they apply to this case. It surely must be contrary to public policy that a spouse should be able to go as far as the Divisional Court relying on the validity of the marriage, and thereafter succeed on a petition for nullity if, as in the present case, she had knowledge of the facts and of the law.

Havers J. obviously felt some difficulty. He appears to have thought that the chief consideration was whether or not there was pecuniary benefit. With respect, I do not think that that is a necessary element. There can be approbation without the taking of pecuniary advantage, as the speech of Lord Selborne L.C. in

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[11] 10 App.Cas. 171, 186.

G. v. *M.*[11] showed; and, in my opinion, there was approbation on the facts of this case, and approbation of a kind which would make it inequitable to grant a decree of nullity to the wife. I would add that it seems to me that the application that the husband should lodge £15 security for the costs of the wife's appeal to the Divisional Court, coupled with his doing so, may be said to be a pecuniary benefit to her, or conduct which ought to estop her from subsequently asking for a decree of nullity.

In my opinion, this appeal should be allowed, and the decree of nullity granted to the wife should be set aside.

BIRKETT L.J. William Tindall, the husband, appeals to this court and asks that the judgment of Havers J. should be set aside, and that the petition for dissolution of the marriage on the ground of the wife's desertion should be ordered to be tried. It was submitted on behalf of the husband: (1) that the trial judge was wrong in deciding on the evidence that the marriage had never been consummated because of the husband's incapacity; (2) that the judge misdirected himself on the question of corroboration; and (3) that the judge was wrong in law in rejecting the husband's plea that the wife's prayer failed because of insincerity and because she had approbated the marriage which she now sought to have declared null and void. I can deal with the first two submissions quite briefly.

The judge saw and heard the witnesses on both sides, and he said that on a number of matters the husband had not told him the truth, whereas he believed the wife's story to be true. The judgment of the judge shows how carefully he considered all the evidence, and he sets out the main facts in some detail. He considered, too, the weight to be attached to the medical evidence, and the bearing on the issues before him of certain proceedings which had taken place before the justices in 1947 and 1950. It would be quite impossible for this court to disturb these findings of fact, unless it was clear that the judge had come to his conclusions by importing considerations to which he ought to have paid no attention, or some other fault in the judgment of the like kind.

It was said for the husband that the judgment could be successfully assailed because the trial judge misdirected himself on the question of corroboration, and that this misdirection vitiated his findings of fact. The judge observed that in cases of this nature evidence of corroboration was not, naturally, expected to be very plentiful, but he thought that the mother of the wife did corroborate the wife in certain matters which he set out in the judgment.

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[11] 10 App.Cas. 171.

[His Lordship then referred to the evidence and the comments by Havers J. on the issue of corroboration, and continued:] The question of corroboration was considered in the recent case of *Hodgkins* v. *Hodgkins*.[12] In that case Bucknill L.J., after reviewing the authorities and citing *U.* (*falsely called J.*) v. *J.*,[13] in which Lord Penzance had spoken of the corroboration required, said [14]: "It is clear from that judgment that corroboration is "not required: it is not even required when the respondent "denies the allegations of the petitioner; but, of course, the "matter must be examined with the greatest care." Singleton L.J., after considering the case to which I have referred, said [15]: "Therefore, I think it right to say that in a case of this nature "corroboration is not essential"; and Hodson J. said [16]: "In "so far as the commissioner has founded himself upon absence "of corroboration, which is not clear, I would respectfully dis-"agree with him, because I think that there is some corrobora-"tion of the husband's physical condition in the evidence given "by the doctor who was called. But the matter cannot be left "there, and I think it desirable that this court should make it "clear that corroboration is in practice required by the court, "unless the absence of corroborative evidence can be satisfac-"torily accounted for, in this class of case"; and, again [17]: "The cases already referred to show clearly that this court has "acted in the past on independent evidence, apparently in direct "contravention of the 105th canon, and I do not wish to be taken "as saying that corroboration is necessary in law."

The court there was dealing with a case of nullity, and all that Havers J. was doing in the present case was to say how valuable corroboration is in cases of this kind, if it is to be found, and how closely the evidence must be scrutinized if it be absent. I am quite satisfied that Havers J. did not misdirect himself on the question of corroboration, and I think that the first two submissions on behalf of the husband fail.

But the main ground of appeal was that the wife's prayer in the answer ought to have failed on the ground of insincerity, and that she has approbated the marriage within the meaning of the doctrine laid down in *G.* v. *M.*[18] and the cases which have followed that decision. I need not read the passages from the speeches in *G.* v. *M.*[18] because the substance of them has already been read, but this passage I must refer to in the speech of Lord Selborne L.C.[19]: "My own belief is that, to whatever criticism "the phraseology of learned judges in those cases may be open, "(and I must say that the adoption of that particular phrase "'sincerity' seems, as the learned counsel said, to suggest a "psychological question rather than one of law or fact, diving into "the motives of a person's mind rather than trying whether a "cause of action exists or not)," and then the Lord Chancellor continued his speech by the passage which has already been read by my Lord in his judgment.

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[12] [1950] P. 183; [1950] 1 All E.R. 619.

[13] (1867) L.R. 1 P. & M. 460.

[14] [1950] P. 183, 188.

[15] Ibid. 189.

[16] Ibid. 191.

[17] Ibid. 192.

Then Lord Watson said[20]: "I think that when those cases "are dissected they do show the existence of this rule in the law "of England, that in a suit for nullity of marriage there may be "facts and circumstances proved which so plainly imply, on the "part of the complaining spouse, a recognition of the existence "and validity of the marriage, as to render it most inequitable "and contrary to public policy that he or she should be permitted "to go on to challenge it with effect." More passages I need not read from those speeches, but the whole case of *G.* v. *M.*[21] must, of course, be considered.

Havers J., in this case, found that the wife "must be taken "to have known both the facts and the law"; and, indeed, no other conclusion could be drawn from the admitted facts in this case. She knew as early as September 13, 1947, that she was able to begin proceedings for nullity of marriage forthwith (see the solicitor's letter of that date sent out on her behalf) and the facts she had told the solicitor form conclusive evidence that she knew the law to be this, that a remedy was available. The case must, therefore, be viewed as one where she knew everything that it was material to know. With this knowledge, therefore, she took out a summons on October 9, 1947, before the justices alleging that her husband had deserted her, and that he had been guilty of persistent cruelty. The summons was due to be heard on October 30, 1947, but it was adjourned, and it was heard by the justices on July 14, 1950. After hearing the evidence the justices dismissed the summons, and put their decision into writing. The wife appealed to the Divisional Court, and on

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[18] 10 App.Cas. 171.

[19] Ibid. 186.

[20] Ibid. 197.

[21] Ibid. 171.

January 11, 1951, after hearing argument, the Divisional Court dismissed the appeal.

In *Nash* v. *Nash*[22] Langton J. discussed the question of sincerity and approbation in a judgment of great value. He took the view that the sincerity referred to had a special and limited meaning, and was to be confined to the sincerity of the plea, and he therefore said[23]: "The view which I have formed from a "consideration of these and other cases bearing on the point, is "that the 'sincerity' with which the court is concerned has "reference only to the sincerity of the plea, and has nothing "whatever to do with either (a) the general character of the "petitioner as a sincere or insincere person, or (b) with the "conduct of the petitioner before her marriage or the motives "which prompted her to enter into the marriage."

For my own part, I find it difficult to make a clear distinction between the sincerity of the plea and the evidence tending to show approbation in the sense in which it was defined in *G.* v. *M.*[24]; but I do not think that it is necessary in this case to enter into any prolonged discussion of this very vexed question, for the passage I have read from the speech of Lord Selborne L.C. indicates that although the question of insincerity may be a psychological question diving into the motives of a person's mind rather than trying whether a cause of action exists or not, the reason which underlies it relates to the conduct on the part of the person seeking the remedy. There may be: (1) conduct which ought to estop the person seeking the remedy from obtaining it, because (a) the person has approbated the marriage with a knowledge of the facts and the law; or (b) has taken advantages from the marriage so that it would be unfair or inequitable to permit him now to treat the marriage as though it had never existed; or (c) because of circumstances producing the same effect created by the acts and conduct of the person seeking the remedy which would make it contrary to substantial justice. Then (2) according to Lord Watson (in the passage which has already been read) there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect.

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[22] [1940] P. 60; 56 T.L.R. 274; [1940] 1 All E.R. 206.

[23] [1940] P. 60, 64.

[24] 10 App.Cas. 171.

It is also to be observed that Langton J. in *Nash* v. *Nash*[25] said: "The petitioner must be sincere in the sense of not "having wavered in her view as to the action she will take to "assert her rights after she attained full knowledge of the facts "and the law concerning those rights." There can be no doubt that in this case the wife approbated the marriage with knowledge of the facts and the law. The letter of September 13, 1947, from her solicitor makes that quite plain in words: "If my instruc-"tions are correct, it is clear to me that you are incapable of "consummating the marriage, and I am instructed to commence "proceedings for nullity of the marriage forthwith." Following on that clear declaration came the proceedings in the justices' court and the Divisional Court. Those proceedings, based as they were on the existence of a valid marriage, were plainly an approbation of the marriage.

The question is: was it an approbation that makes it inequitable and contrary to public policy to allow her now to assert the invalidity of the marriage? Is there conduct here that ought to estop her from having the remedy which she now seeks? If she is debarred from the remedy by her acts and conduct, will that course be in accordance with substantial justice?

Havers J. appears to have been much influenced by the fact that the wife had obtained no benefits from the proceedings before the justices and the Divisional Court. That, of course, would be a most important consideration in considering the test which Evershed M.R. laid down in *W.* v. *W.*,[26] but it does not conclude the matter. In this case the husband was put to expense in defending the proceedings and was ordered to give security for the wife's costs on her appeal from the justices, and it might be said that it was unfair and inequitable now to allow the wife to fight her husband on a ground which she had deliberately abandoned when she proceeded in the justices' court. But quite apart from that consideration I am of opinion in this case that the question of public policy referred to by Lord Watson must be considered. I think that the test is this: in the light of all the known circumstances of the case—the proved incapacity of the husband, the nature of the married life, the effect of granting or withholding the remedy sought, and the plain approbation of the marriage with knowledge of the facts and the law, and all the other circumstances—is it contrary to public policy that the wife's prayer should be granted?

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[25] [1940] P. 60, 69.

[26] [1952] P. 152.

In my opinion, it is. To assert the validity of the marriage in the courts and to seek the remedies which are available to those in the married state, and then to assert the invalidity of the marriage when the remedies formerly sought have been refused, ought not to receive countenance. I am, therefore, of opinion that there are facts and circumstances proved in this case which, in the words of Lord Watson,[27] "so plainly imply, "on the part of the complaining spouse, a recognition of the "existence and validity of the marriage, as to render it most "inequitable and contrary to public policy that he or she should "be permitted to go on to challenge it with effect."

I think that the appeal should be allowed.

MORRIS L.J. I agree. Following on the letter of September 13, 1947, in which the wife's solicitor wrote that he was instructed to commence proceedings for nullity of the marriage forthwith, a complaint was presented on October 9, 1947, in the court of summary jurisdiction alleging that the husband had deserted his wife and had been guilty of persistent cruelty to her, and applying for an order that the wife be no longer bound to cohabit with her husband, and that he should pay her such weekly sum not exceeding £2 as the court should consider reasonable. The very basis of the jurisdiction invoked by the wife was that a valid marriage existed and continued. When after a long interval the complaint was heard and determined it was dismissed. That was on July 14, 1950.

The wife appealed, and so continued to seek to persuade the court that she should have the redress to which a wife would be entitled if she had been deserted or if her husband had been guilty of persistent cruelty. She sought, and obtained, the security for her costs which a husband may be ordered to give. After her appeal failed, her husband presented a petition for dissolution of the marriage, alleging desertion. By her answer and cross-prayers the wife prayed for a decree of nullity, or, alternatively, for dissolution of the marriage on the ground of her husband's cruelty and desertion. In praying for a decree of nullity the wife was asking the court to declare and pronounce her marriage "to have been and to be null and void to all "intents and purposes in the law whatsoever," and to pronounce her "to have been and to be free from all bond of marriage."

In my judgment, having regard to the course of action deliberately adopted and pursued by the wife, there was a recognition by her of the marriage in circumstances which would make it unfair as between the parties and, from a public point of view, unseemly, to entertain her prayer for a decree of nullity.

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[27] 10 App.Cas. 171, 197–8.

Appeal allowed.
Decree of nullity set aside.

Solicitors: *Smith & Hudson for Williamson, Stephenson & Hepton, Hull; Pearlman & Rosen, Hull.*

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Jan. 12, 13, 14, 15, 16; *Feb.* 10.
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Husband and Wife—Divorce—Desertion—Substituted service of petition—Wife unaware of petition—Undefended action—Decrees nisi and absolute granted—Remarriage by husband six days after decree absolute—Child born of remarriage—No sufficient and reasonable steps taken by husband to effect service on wife—Decrees voidable—Jurisdiction of court—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 57*—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 31 (1) (*e*), 184 (1).

A husband, having filed a petition for divorce on the ground of desertion by the wife, obtained an order for substituted service by means of an announcement inserted in an evening newspaper published in a town where relatives of the wife were known to reside. In fact, he had not taken obvious and reasonable steps to bring knowledge of the petition to the wife, who was employed on the Continent of Europe by U.N.R.R.A. and similar organizations. The petition was therefore heard as an undefended case, and decrees nisi and absolute were granted. Six days after the decree absolute the husband married again, and a year later a child was born of the remarriage. The respondent wife did not become aware of the petition and the decrees until some time later, and having obtained leave of the court to appeal, notwithstanding that the time for appealing had expired, she moved for an order setting aside the decrees and directing a new trial of the petition:—

Held, that in the absence of fraud the proceedings were not void and a nullity, but were voidable; that the failure of the husband, even though inadvertent, to disclose to the court, when applying for leave to serve substituted service, that all obvious and reasonable steps to bring to the knowledge of the wife the existence of the divorce petition had not been taken, had resulted in the wife being deprived of her rights both to defend the petition and to appeal against the decree absolute, and therefore, despite the remarriage and the birth of a child of that remarriage, the court had jurisdiction to set aside all the proceedings and to remit the petition for rehearing.

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Woolfenden v. *Woolfenden* [1948] P. 27; 63 T.L.R. 582; [1947] 2 All E.R. 653; *Craig* v. *Kanssen* [1943] K.B. 256, 262; [1943] 1 All E.R. 108; *Lazard Bros. & Co.* v. *Midland Bank* [1933] A.C. 289; 49 T.L.R. 94; and *Everitt* v. *Everitt* [1948] 65 T.L.R. 121; [1948] 2 All E.R. 545 applied.

McPherson v. *McPherson* [1936] A.C. 177; 52 T.L.R. 166 distinguished.

Per Denning L.J. Once the decree absolute is set aside the second marriage will automatically become void as from that moment, but, *semble*, this avoidance will not relate back so as to render the child illegitimate. The child was legitimate when born, and the doctrine of relation back has never been applied so as to render unlawful that which was originally lawful, e.g., *Elliott* v. *Boynton* [1924] 1 Ch. 250; 40 T.L.R. 180.

MOTION by respondent wife for an extension of time for appealing against a decree absolute, and that being granted, for an order setting aside the decree absolute and decree nisi and directing a new trial of the husband's petition.

The parties were married in 1924, and four sons were born of the marriage. In 1941 the husband, Dr. Wiseman, was working for a Dr. Davis in Totnes, the wife and children living in a furnished house at Dartington. In 1942 the family moved to Paignton, while Dr. Wiseman lived in Dr. Davis' house at Totnes. When that work came to an end he joined the wife at Paignton, but in 1943 he bought a practice in Exmouth and went to live in his predecessor's house. The wife did not join the husband there and there was conflicting evidence as to whether, as alleged by the husband, she was in desertion. The sons were being educated at Dartington Hall School, the school fees being paid by the wife. In May, 1945, the wife undertook work abroad, first in Normandy, then in Athens with U.N.R.R.A., and then in the Balkans with the United Nations Balkan Commission, and afterwards with the World Health Organization in Geneva. In August, 1948, Dr. Wiseman filed a petition for divorce on the ground of desertion, and a copy, with other proper documents, was sent to the wife c/o. United Nations Commission, Athens, but was returned marked "parti," the wife not having been in Athens since December, 1946. Leave to proceed by substituted service was then obtained, and an advertisement was inserted in an evening paper at Nottingham, in which town relatives of the wife were known to be living. The petition then came on for hearing as an undefended case and on March 2, 1949, a decree nisi was made, which was made absolute on April 14. Six days later Dr. Wiseman married a Miss Thomas, who had been a friend of the family, and a year later a child was born of that marriage.

The appellant wife did not become aware of the petition and of the decrees nisi and absolute until upwards of a year later, and she now sought leave to appeal after time had expired, and for an order setting aside the decrees and directing a new trial of the petition. She alleged that the order for substituted service had been obtained by Dr. Wiseman by fraudulent concealment of relevant facts, and was therefore a nullity. Alternatively, it was contended that the husband and his solicitor having failed to take obvious and reasonable steps to acquaint the wife of the petition the order and decrees were voidable, and the court in the exercise of its jurisdiction should set them aside.

J. D. F. Moylan and *C. Wigram* for applicant (Mrs. Ivy E. Wiseman). The existence of the remarriage, although no doubt a matter to be taken into consideration by the court in exercising its discretion, is not a circumstance which prevents this court setting aside the decree absolute, whether it be void or only voidable. The basis of the argument that it is a bar is section 184 of the Judicature Act, which gives to the parties a right to remarry after the decree absolute after the time for appealing has expired. But that section presupposes that there exists a valid decree absolute.

[SOMERVELL L.J. It would also seem to presuppose a right of appeal, which cannot be defeated by a remarriage.]

What prevents section 184 being operative is the existence of section 31, which gives a positive right of appeal to a party who has not had "time and opportunity to appeal from the decree "nisi." If it is held that the decree absolute is a complete nullity, within the decision in *Craig* v. *Kanssen*,[1] the remarriage would be no bar to the court's exercising its jurisdiction. Otherwise a party could defeat the right of appeal by remarrying one day after the expiration of the six weeks.

[SOMERVELL L.J. The husband made no attempt to tell the persons interested on behalf of the wife that he had obtained a decree absolute and had remarried.]

It was not a remarriage authorized by section 184. The decision of the Privy Council in *McPherson* v. *McPherson*,[2] which is relied on by the petitioner, is distinguishable. It is very doubtful whether it lays down the principle that a decree absolute and remarriage are a bar to the jurisdiction to set aside a decree nisi. The position in *Craig* v. *Kanssen* [3] is very much the same as in the present case, and Lord Greene M.R. said: "In my opinion "it is beyond question that failure to serve process where service "of process is required goes to the root of our conceptions of the "proper procedure in litigation. Apart from proper ex parte "proceedings, the idea that an order can validly be made against "a man who has had no notice of any intention to apply for it "has never been adopted in this country." Where the order for substituted service is obtained by complete regularity, and therefore it cannot be said to be void, nevertheless, where in fact the defendant shows a prima facie case on the merits, and shows also that he has not been guilty of laches, the court will usually set aside the order on terms. On the question whether there has been an entire failure of natural justice, affecting one of the parties, see *Marsh* v. *Marsh*.[4] If in this case there has been such a failure, the order is void. The evidence shows that there has been great negligence in failing to disclose the actual extent of the inquiries made to ascertain the address of the wife.

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[1] [1943] K.B. 256, 262; [1943] 1 All E.R. 108.

[2] [1936] A.C. 177; 52 T.L.R. 166.

In *Lazard Brothers & Co.* v. *Midland Bank* [5] Lord Wright said: "The court has discretion to set aside an order made ex "parte when the applicant has failed to make sufficient or candid "disclosure." So here there was a failure to make sufficient or candid disclosure and the order and decrees should be set aside.

D. M. Scott for Dr. Wiseman. There appear to be only two reported cases in which a decree absolute has been set aside—*Woolfenden* v. *Woolfenden* [6] and *Everitt* v. *Everitt*.[7] In the latter case there was no remarriage and no service in fact. In *Edwards* v. *Edwards* [8] both those cases were referred to and Pilcher J. held that there was no authority for the contention that the court had jurisdiction to rescind the decree absolute in a case where it had not been suggested that the decree absolute was a nullity either by reason of a failure to comply with statutory requirements, which were conditions precedent to the right to a decree, or by reason of procedural irregularity, which caused a failure of natural justice. In *Kemp-Welch* v. *Kemp-Welch* [9] Sir

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[3] [1943] K.B. 256, 262; [1943] 1 All E.R. 108.

[4] [1945] A.C. 271.

[5] [1933] A.C. 289, 306.

[6] [1948] P. 27.

[7] [1948] W.N. 237; 65 T.L.R. 121; [1948] 2 All E.R. 545.

[8] [1951] P. 228.

[9] [1912] P. 82.

Samuel Evans P. held that he had no jurisdiction on motion by a co-respondent to rescind a decree absolute on the ground that the decree and verdict and judgment upon which the decree was founded were obtained by fraud. A decree absolute is sacrosanct. In divorce there is power to dispense with service of process, and therefore the regulations are less stringent. There appears to be no reported case which is entirely in point here except *McPherson* v. *McPherson*,[10] in which the Privy Council held that inasmuch as the time for appealing against the decree absolute had expired before the action to rescind the decrees was instituted, and a new status had been acquired by the petitioner remarrying and becoming, as was his present wife, entitled to the protection afforded by section 57 of the Divorce and Matrimonial Causes Act, 1857, the decree absolute, although originally voidable, had become unassailable. So, in the present case, the remarriage makes the decree absolute unassailable.

[*Evans* v. *Bartlam*[11]; *Meier* v. *Meier*[12]; *Fry* v. *Moore*,[13] and *Baker* v. *Baker*[14] also referred to.]

H. E. Park for Mrs. Eileen P. Wiseman.

Leave to appeal having been granted, witnesses were called by both sides, and at the conclusion of the evidence their Lordships intimated that they were satisfied that the allegation of fraud was not established, and it was not pressed.

Cur. adv. vult.

Feb. 10. SOMERVELL L.J. This is a motion by a respondent wife for extension of time to appeal against a decree absolute, and if that is granted for an order that the decree absolute and decree nisi be set aside, and for a new trial. On an earlier occasion we issued directions as to the procedure and joinder of parties.

The first point which the respondent wife, Mrs. Ivy Elizabeth Wiseman, to whom I will refer as Mrs. Wiseman, has established is that she had no knowledge or suspicion of the divorce proceedings until some months after the decree absolute. There was some lapse of time after she knew before application was made to the court. That was considered on an earlier occasion and we regarded the lapse of time as satisfactorily explained. It follows from what I have said that there was no personal service. An order for substituted service was made by publication in the Nottingham Evening News. This was done, but no knowledge of this reached Mrs. Wiseman, and she attacks this order as one which would never have been made if the facts, as known to or assumed by the petitioner husband, Dr. Wiseman, had been disclosed to the court. If, as submitted, this order was a nullity, then the subsequent proceedings based on it would, I think, be of no effect. If it is not a nullity, then it is submitted that it is voidable and that having regard to all the circumstances the decrees should be set aside.

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[10] [1936] A.C. 177.

[11] [1937] A.C. 473; [1937] 2 All E.R. 646.

[12] [1948] P. 89.

[13] (1889) 23 Q.B.D. 395.

[14] [1906] P. 209.

[His Lordship stated the facts and continued:] In Dr. Wiseman's petition he alleged that Mrs. Wiseman refused to join him at Exmouth in March, 1944, and that this amounted to desertion by her. She, if she had known of the proceedings, would have desired to submit to the court that she was not in desertion and was justified in not going to Exmouth. That was an issue which we clearly could not try, but I was satisfied that there were issues proper to be tried.

The sons were at Dartington Hall School and Dr. Wiseman since, at any rate, about that time, never paid anything for their schooling or maintenance. That has been done by Mrs. Wiseman. In May, 1945, she undertook work abroad and I will set out her movements. May to July, 1945, she was in Normandy. July, 1945, to December, 1946, she was in Athens, where she had a post in U.N.R.R.A. That work came to an end. From January, 1947, to October, 1947, her base was Salonika. She had a post in the United Nations Balkan Commission and at times visited different Balkan countries, but letters were forwarded. Since then she has worked for the World Health Organization in Geneva, her official address being Palais de Nations, Geneva. She at first lived outside Geneva in Switzerland and then at Ferney Voltaire in France. Over the whole period she visited England at rare intervals. The petition is dated August 13, 1948, and at that time she had been in Geneva some months. There was, in fact, no difficulty at any time in communicating with Mrs. Wiseman. The headmaster of Dartington Hall School was in constant communication with her and would have forwarded any communication to her, though he would probably have asked her leave if her address had been asked for. Dr. Wiseman assumed rightly that the authorities at the school would be in communication with her. He said he rang up the headmaster's secretary and asked for the address, which she refused. Her evidence was that she would not have given a parent's address on the telephone but would have told the inquirer to write to the headmaster. A letter posted to her last known address, namely, Dendy Road, would have been forwarded to her. Dr. Wiseman called at the house and saw the sub-tenant, but there was some dispute as to what took place. It was not the sub-tenant who was forwarding letters. Her married sister, at whose home in Nottingham Dr. Wiseman had stayed, was in touch with her and letters were forwarded. He said that at some date he rang up. He spoke to the nephew, who did not at the moment know his aunt's address. He took no further steps.

When the matrimonial dispute arose in 1944 there was correspondence between solicitors, Mrs. Wiseman employing Messrs. Alny & Thomas. They continued to act for her in connexion with 6, Dendy Road, and were in touch with her throughout. Dr. Wiseman knew that when they were together she had an account with the Midland Bank, Birmingham. She continued to bank there and communications would presumably have been forwarded. Dr. Wiseman knew that the sons, or some of them, were going to stay with their mother at Geneva. He said he asked Jeremy, who gave evidence, for her address. Jeremy disputed this. The obvious course was to ask the boy if he would take or forward a letter, and he said that he would have done so. Other ways of communication were suggested, but these are sufficient. After the petition was filed a copy, with other proper documents, was sent to Mrs. Wiseman, care of the United Nations Commission, Athens. Dr. Wiseman said that a Mr. Phillips told him that this address had been given him by Dartington Hall School. Mr. Phillips was not called and this seems extremely unlikely if the inquiry was made at any relevant date. In May, 1948, the headmaster was writing to Mrs. Wiseman to her official address at Geneva. She had not been in Athens since December, 1946. The envelope was returned marked "parti." No further inquiries appear to have been made.

If it was thought that the address had been given by the school the obvious course was to write and ask for the new address. No request to forward the document was ever made to the school, the solicitors, her sister, her brother-in-law or any of the sons. What, then, was relied on in the affidavit sworn by Mr. Dyke, Dr. Wiseman's solicitor, in support of the application for the order for substituted service? The affidavit is entirely hearsay. Some letters were exhibited indicating what, on the face of them, were extremely perfunctory inquiries in Nottingham in December, 1947, with an article which had appeared about her in a newspaper. It is fair to Mrs. Wiseman to say that she took strong exception to the tone and character of that article. It indicated that she had been in France, Athens, and Salonika. It did not refer to Geneva where she had just started or was about to start work. There was then a reference, without a date, to an inquiry from the eldest son. It was, in fact, made in June, 1947. He did not then know his mother's whereabouts, but was in touch with her shortly after, or stayed with her in 1948, in Switzerland.

Then there is paragraph 5: "According to my instructions the "petitioner knows of no means whereby the present address of "the said respondent may be ascertained but I verily believe "that an advertisement circulating in Nottingham will bring "these proceedings to her notice." The only ground suggested for so presuming was that her sister and her father lived there. It seems incredible that, their addresses being known, the direct method of informing them was not adopted, as against the chance of their reading this particular announcement in this particular evening paper. At any rate, a marked copy of the paper might have been sent. Mr. Dyke said, in the course of his evidence, that inquiries from a solicitor sometimes prevent information being given. This may be so in some cases. Here, what was required was the co-operation of those known to be in touch with Mrs. Wiseman, in order that she might know of proceedings against her, so that she might, if so minded, defend them. It is plain on the evidence that this co-operation would have been forthcoming. It is one thing to ask for an address for an undisclosed purpose. It is another to ask that a party against whom proceedings are being taken should be informed of them. If the court had been told the facts as known or assumed, in particular of those known to be in communication with her, I am satisfied the order could never have been made.

The publication having been made, the case came on as an undefended case and the decree nisi was made on March 2, 1950. It was made absolute on April 14, and on April 20 the petitioner married a Miss Eileen Thomas. A child was born a year later. Under the directions which we gave the second Mrs. Wiseman was made a party and a guardian ad litem was appointed for the child. Mrs. Wiseman, the respondent, alleged that the order for substituted service had been obtained by the fraud of Dr. Wiseman, by fraudulent concealment of relevant facts. I am not surprised that this was alleged, but having heard Dr. Wiseman and his solicitor, Mr. Dyke, that allegation, in my opinion, failed. It is, however, in my view, established that methods of communication which were reasonably obvious could have been, and were not, either used or brought to the knowledge of the court. This should have been done.

I do not think that the order was a nullity, as would be, for example, an order made without jurisdiction: *Woolfenden* v. *Woolfenden*[1]; *Craig* v. *Kanssen*.[2] The latter case was concerned with a failure to serve. The order, for reasons which do not, I think, apply here, was held to be a nullity, but the following statement by Lord Greene M.R., is relevant. "In my opinion, "it is beyond question that failure to serve process where service "of process is required goes to the root of our conceptions of the "proper procedure in litigation. Apart from proper ex parte pro-"ceedings, the idea that an order can validly be made against "a man who has had no notice of any intention to apply for it "has never been adopted in this country." For reasons which I have given, I do not think the ex parte proceedings here were "proper," and this view is, I think, in accordance with what was laid down in the House of Lords in *Lazard Brothers & Co.* v. *Midland Bank*.[3] There, as here, the parties were acquitted of bad faith but the court had been misinformed as to the real position. It was held that the obligations which rest on those seeking an ex parte order were not fulfilled. The order in *Lazard's* case[3] was for service out of the jurisdiction. Lord Wright said, "The court "has discretion to set aside an order made ex parte when the "applicant has failed to make sufficient or candid disclosure." A judgment had been obtained in default of appearance and garnishee proceedings based upon it. There were other grounds upon which the judgment and garnishee proceedings were set aside, but it is clear that the House regarded the impropriety in the obtaining of the order as a sufficient ground for their conclusion.

The procedure for an appeal from a decree absolute was considered and laid down in *Everitt* v. *Everitt*,[4] and has been followed in this case. Section 31 (1) (*e*) of the Judicature Act, 1925, reads as follows: "No appeal shall lie from an order "absolute for the dissolution or nullity of marriage in favour of "any party who, having had time and opportunity to appeal from "the decree nisi on which the order was founded, has not "appealed from that decree." In *Everitt's* case[4] it was held,

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[1] [1948] P. 27; 63 T.L.R. 582; [1947] 2 All E.R. 653.

[2] [1943] K.B. 256, 262; [1943] 1 All E.R. 108.

[3] [1933] A.C. 289, 306, 307; 49 T.L.R. 94.

[4] [1948] 2 All E.R. 545.

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as I hold here, that the party who decided to appeal had not had time and opportunity to appeal from the decree nisi and had, therefore, a right of appeal to this court. The ground was that the petition had never been served. This court held that the right to appeal existed wherever the party seeking to appeal could satisfy the court that the statutory condition was fulfilled in that he or she had not had time or opportunity to appeal from the decree nisi. Apart from the remarriage and birth of the child I would have had no doubt that leave to appeal out of time should be given, that the decrees should be set aside and Mrs. Wiseman given an opportunity of putting her case before the court.

It is submitted, first, that a decision of the Judicial Committee has decided that remarriage is an absolute bar to the relief sought in these proceedings. That case, *McPherson* v. *McPherson*,[5] fell to be decided under the law of Alberta which was in essentials that contained in the Matrimonial Causes Act, 1857. In that case the petition was presented by the husband. The wife had due notice but made no answer and a decree nisi was pronounced which was later made absolute. The right of appeal was not limited, as it is now in this country, by the section just cited.

[His Lordship read section 57 of the Matrimonial Causes Act, 1857,[6] and continued:] Some time after the period for appeal had expired the husband remarried. The wife then commenced an action against her former husband to set aside the decrees on the ground that he had committed perjury and, if they were set aside, for restitution of conjugal rights. She later alleged that the trial of the divorce action was a nullity not being a trial in open court. It was with this latter point only that the Judicial Committee were concerned. The Judicial Committee held that the decrees were voidable but not void. Apart from the alleged exclusion of the public the proceedings were regular and the wife, if so minded, could have put in an answer and defended. There was, as Lord Blanesburgh said, a serious trial free from any other defect in procedure. I will set out the passage relied on[7]: "In the present case it was open to the "Attorney-General of the Province, or the King's Proctor on his "behalf, had he in the public interest thought fit to move by "way of appeal, or before time for appeal had expired to move "the trial judge himself to discharge the impugned orders on "the ground that the trial, from which both resulted, had not "been held in open court. In other words, the public through "the Attorney-General had the fullest right of intervention. "But any such intervention had to be made before time for "appeal had expired, or before the rights of third parties had "intervened. Just as a contract to take shares in a company "induced by fraud, and being voidable only, may be set aside "before winding up commenced but not later, after the rights "of the company's creditors have intervened, so here, the order "absolute cannot be touched after the time for appeal therefrom "has passed, and a new status has been acquired, or in this "case, after the respondent, having remarried, is entitled, as is "also his wife, to the protection afforded by section 57 of the "Matrimonial Causes Act, 1857. It follows in their Lordships' "judgment that the appeal fails: the order absolute, although "originally voidable, having become unassailable by the time "the appellant's claim was made."

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[5] [1936] A.C. 177; 52 T.L.R. 166.

[6] Matrimonial Causes Act, 1857, s. 57: "When the time hereby "limited for appealing against any "decree dissolving a marriage shall "have expired, and no appeal shall "have been presented against such "decree, or when any such appeal "shall have been dismissed, or when "in the result of any appeal any "marriage shall be declared to be "dissolved, but not sooner, it shall be "lawful for the respective parties "thereto to marry again, as if the "prior marriage had been dissolved "by death. . . ."

There seem to me to be three grounds for rejecting the submission made on behalf of Dr. Wiseman and the second Mrs. Wiseman that this decision concludes the matter. In the first place, the Judicial Committee were dealing with an action to set aside a judgment and not with an appeal against that judgment. Prima facie, a judgment can be set aside in an action only if the plaintiff shows that it was obtained by fraud. He certainly cannot by action get it set aside by showing simply that it was erroneous. On an appeal that, of course, is precisely what he can do. It would, therefore, I think, be quite wrong to treat what was said in that case as applicable in an appeal.

Secondly, the equivalent of section 57 under our law is section 184 of the Judicature Act.[8] In the present case there was a right of appeal, and those words clearly refer to the right

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[7] [1936] A.C. 177, 204.

[8] Supreme Court of Judicature (Consolidation) Act, 1925, s. 184: "(1) As soon as any decree for divorce "is made absolute, either of the "parties to the marriage may, if there "is no right of appeal against the "decree absolute, marry again as if "the prior marriage had been dis-"solved by death or, if there is such "a right of appeal, may so marry "again, if no appeal is presented "against the decree, as soon as the "time for appealing has expired, or, "if an appeal is so presented, as soon "as the appeal has been dismissed."

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impliedly conferred by section 31 (1) (*e*). If one takes the time for appealing as the six weeks prescribed by the rules, irrespective of any right to apply for an extension when the party hears of the proceedings, the marriage between Dr. Wiseman and Miss Thomas took place before the time for appealing from the decree absolute had expired and is, therefore, not within the protection of the section. One fact which may have some effect on one's consideration for Dr. Wiseman is that when he obtained his decree nisi he never informed either his eldest son, who was of age, or his wife's sister. If he had done so it is reasonably plain that the wife would have been informed and would have consulted her solicitors and applied to defend in time.

In the third place, I think that the word "unassailable" used by Lord Blanesburgh in *McPherson's* case should be construed in its context. The context was in relation to an irregularity which did not affect the wife's rights in that case. She had no merits. The irregularity was a matter of public concern and no grounds were put forward as to why the Attorney-General or King's Proctor or the wife herself should not have moved in time. I think, therefore, on any view the words used should not be treated as necessarily applicable to other types of irregularity. If, however, I am right in my first point this does not arise. I think, therefore, that we have jurisdiction and that the question, a difficult one, is how it should be exercised.

Whatever we do, the status of one or other of the women will be affected in a manner repugnant to the law. Mrs. Wiseman, the respondent, if the decree stands, has had her status and the financial rights of herself and her children affected by proceedings of which she had no knowledge. On the other hand, the second Mrs. Wiseman has gone through a form of marriage and lived with, and borne a child to, a man whom she believed to be free to marry without any possibility of subsequent proceedings. I am led to the conclusion that the decrees should be set aside and a new trial ordered by the importance which I think should be attached, particularly in divorce proceedings, to effective service which will, and does, in fact, bring the matter to the knowledge of the respondent. Here there was, for reasons which I have given, no difficulty in so doing. If difficulties were imagined which did not exist, obvious steps which could have been taken would have established their non-existence. Very relevant facts were, albeit by inadvertence, not disclosed to the court. I would, therefore, allow the application.

Counsel for the respondents to the motion submitted that Mrs. Wiseman, the applicant, should be put on terms to cross-petition. I do not think that would be right. I can only hope that notwithstanding views which I understand she holds about divorce, she will see the propriety, in the circumstances which have arisen, of taking this course.

Denning L.J. In this case the husband filed a petition for divorce against his wife on the ground of her desertion. She was in Europe at the time, and the petition was not served personally upon her. The husband's solicitor applied for an order for substituted service upon her and this was granted. In accordance with the order the wife was served by advertisement in a Nottingham evening newspaper. But this advertisement never came to her notice and she knew nothing of the petition. In complete ignorance of what was afoot, the wife did not defend the case and the husband obtained a decree nisi against her, and subsequently a decree absolute. A week later, he married another woman and a child has been born of this second union. It was more than a year after the divorce that the wife got to know of it. She thereupon took steps as soon as she could to have it set aside. She has applied to this court for leave to appeal against the decree absolute, and we have heard evidence on both sides. This has shown that the husband and his solicitor failed in their duty to the court when they applied for and obtained the order for substituted service. They were not in the least fraudulent, but they did not take any one of the many simple steps which would have enabled the petition to reach the wife. They did not make that full and frank disclosure to the court which is incumbent on any person who applies for an order in the absence of the other side.

The first question is whether this failure on their part makes the proceedings thereafter in the divorce suit absolutely void or only voidable. The distinction between a transaction which is void, and one that is only voidable, as I understand it, is this: if a transaction is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. A good instance is a bigamous marriage. But if a transaction is only voidable then it is not automatically void. Something must be done to avoid it. There must be an order of the court setting it aside or some other act recognized by the law as sufficient for the purpose. And being only voidable, the court has a discretion whether to set it aside or not, and may always impose terms as a condition of setting it aside. It will usually refuse to set it aside where there has been a waiver by the party concerned or where third parties have acquired rights or interests in the belief that the transaction was good, though this is not an invariable rule. A good instance of a voidable transaction is a marriage which is voidable for wilful refusal to consummate it: see *De Reneville* v. *De Reneville*.[9] It has been said that one test of the distinction between void and voidable is to inquire whether the transaction has caused a failure of natural justice (see *Marsh* v. *Marsh* [10]) but I confess that I cannot follow this. If the defect is such as to make the transaction absolutely void, then void it is, no matter whether it causes a failure of natural justice or not. But if the effect of the defect is only to make the transaction voidable, then natural justice may well be taken into account by the court in deciding whether it will in its discretion set the transaction aside or not, but it does not make the transaction automatically void. In the present case I do not think that the failure of the husband and his solicitor to do their duty made the proceedings absolutely void. Suppose, for instance, that the wife had seen the advertisement at the time and entered an appearance, the defect would have been waived and no court would set the proceedings aside. That shows that the order for substituted service was only voidable, but not void. So, also, the proceedings which followed it, down to and including the decree absolute, are only voidable and not void.

The second question is, what is the effect of this voidability? Will the court set aside the decree absolute? In justice to the first wife, it should do so. She has been divorced without any knowledge of the proceedings against her at all. It was not her fault that she did not know of it. It was the fault of her husband or his solicitor. And when she did know of it she immediately took steps to set it aside. I feel no doubt that if the interests of third parties had not intervened the court would unhesitatingly have set the decree aside and allowed her to come in and defend the proceedings. But what is the effect of the remarriage and the birth of the child? That is a serious matter for the court to take into consideration but it is not an absolute

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[9] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[10] [1945] A.C. 271; 62 T.L.R. 20.

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bar to the court's power to set the decree aside. If the Privy Council in *McPherson* v. *McPherson*[11] thought it was a complete bar, I cannot agree with them. It would be a bad thing if a husband could abuse the process of the court and yet keep the benefit of it by the simple expedient of marrying again. Take this very case: one or other of the two women must suffer injustice. One or other must find herself single when she thought that she was married. Each of them has an equal claim to the sympathy of the court. But the husband has no such claim. It is he or his solicitor who has caused all the trouble. The nearest approach to justice which we can do is, I think, this: set the decree absolute aside and let the first wife come in to defend herself. That does justice to her. If on the retrial, the husband gets a divorce from the first wife he can remarry the second wife and that will do justice to those two. If, however, he does not get a divorce, so much the worse for him. He deserves his fate.

The second wife will then most unfortunately suffer, but every woman, when she marries, takes her husband on trust to some extent. If she marries a man who describes himself as a bachelor she takes him on trust that he is not a married man. If she marries a man who says that he has divorced his wife, she takes him on trust that he has obtained the divorce properly. If her trust turns out to be misplaced, it is a misfortune which many women have suffered before her, but it is not unjust. I do not forget the child of the second union. I do not think it should suffer. Once the decree absolute is set aside, the second marriage will automatically become void as from that moment but, as at present advised, I do not think that this avoidance will relate back so as to render the child illegitimate. The child was legitimate when born, and the doctrine of relation back has never been applied so as to render unlawful that which was originally lawful, e.g., *Elliott* v. *Boynton*.[12] Thus, when a marriage which is voidable is avoided, the avoidance as a rule only speaks from its date. It does not relate back to the beginning: *Fowke* v. *Fowke*[13]; *Adams* v. *Adams*.[14] It was suggested in the artificial insemination case of *R. E. L.* v. *E. L.*[15] that the child of a voidable marriage may, on its avoidance, become illegitimate. That is not good law and it has since been overruled by section 4 of the Law Reform (Miscellaneous Provisions) Act, 1949.

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[11] [1936] A.C. 177; 52 T.L.R. 166.

[12] [1924] 1 Ch. 236, 251; 40 T.L.R. 180.

[13] [1938] Ch. 774; 54 T.L.R. 801; [1938] 2 All E.R. 638.

[14] [1941] 1 K.B. 536; 57 T.L.R. 329; [1941] 1 All E.R. 334.

[15] [1949] P. 211, 219.

In my opinion, therefore, we ought to extend the time for appealing from decree absolute and treat this application as the hearing of the appeal. The order for substituted service should be set aside and all proceedings subsequent to it. The first wife should be let in to defend and directions given for necessary interlocutory steps.

HODSON L.J. The appellant, who is the first wife of Dr. Wiseman, seeks leave to appeal from a decree absolute of divorce in April, 1949, notwithstanding that she did not appeal from the decree nisi. She relies on the provisions of the Judicature Act, 1925, s. 31 (1) (*e*): "No appeal shall lie from "an order absolute for the dissolution or nullity of marriage in "favour of any party who having had time and opportunity to "appeal from the decree nisi on which the order was founded, "has not appealed from that decree." Having heard the evidence called in the court on behalf of the parties, it is clear that the petition upon which the husband obtained a decree of divorce was never brought to the attention of the wife until long after the decree absolute had been pronounced and he had remarried. It was not served upon her and an order for substituted service was obtained in circumstances which, to say the least, were thoroughly unsatisfactory. The wife was a person whose address could at any time have been ascertained, but no serious attempt was made by the petitioner, or anyone on his behalf, to do so. All the obvious lines of inquiry in cases of this nature were open. She had relations whose whereabouts were known to the husband and who were in regular touch with her. Her children by her husband were, to his knowledge, being maintained by her and educated at a school in England, the identity of which he knew. These children were, to his knowledge, in touch with their mother. She had employed solicitors since the separation of the parties and had never, so far as the husband knew, withdrawn the instructions given to them. She had, to her husband's knowledge, a banking account at all material times until the separation.

These lines of inquiry were either not pursued at all or only in the most perfunctory manner. The order itself, directing an advertisement in a newspaper, which the relatives might see, rather than a communication to the relatives themselves, had nothing to recommend it. Accepting the husband's evidence that it never occurred to him to write to his wife herself, or to her bankers, and that for some reason or other he got it into his head that his wife was trying to keep out of the way and that none of the children or her relatives were disposed to help him, and that he disclosed all material sources of inquiry except the bank to his solicitors, I cannot find any ground for convicting the husband of fraud.

I am of opinion, however, that this is a case in which, according to the established principles governing ex parte orders, the court is entitled to say that the information laid before it was wholly insufficient to justify an order for substituted service being made. This is not to say that in such circumstances an order for substituted service is to be treated as a nullity. I think it is clear from the authorities that although an order for substituted service may be irregular and accordingly voidable, yet a defendant may so act thereafter as to waive the irregularity: *Fry* v. *Moore*.[16] In that case the defendant, having first taken steps in the action to obtain an order for a statement of claim, applied to set aside the writ and was held to have waived the irregularity of service. I do not think any question of waiver can be said to arise here. The wife, as soon as she learned of the decree, entered an appearance with a view to getting rid of the decree, which she has always maintained was pronounced against her contrary to the justice of the case. The order in this case was, I think, voidable and in the absence of waiver the question is whether it should be avoided.

If it could be shown that the defence put forward by the wife was derisory the order should not be avoided, but I do not think this can possibly be said here. The wife had maintained through her solicitors, long before the divorce proceedings, a state of facts which, if true, would be a good defence to these proceedings, and it is the duty of the court to allow her to put forward her defence, even though this involves allowing her appeal against the decree nisi and decree absolute which have been pronounced, unless there is some valid reason to the contrary. It is said that there is such reason even if the wife had no time or opportunity for appeal, because the husband has

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[16] 23 Q.B.D. 395.

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remarried, and a second marriage entered into after decree absolute is unassailable. *McPherson* v. *McPherson* [17] is relied upon as persuasive authority for this proposition. I think that this case is distinguishable. *McPherson's* case was one in which a wife who had not defended a divorce suit brought proceedings for restitution of conjugal rights against her former husband, alleging that the decree he had obtained against her was a nullity. The ground relied upon was that the hearing was irregular in that it was not in public. The Judicial Committee held that it was not void for that reason, only voidable, but that in the words of the judgment "it was unassailable," the husband having remarried. If the Judicial Committee had had to consider a different question, namely, a right to appeal from a decree absolute by the wife on the ground that she had not had time or opportunity for so doing, I have no doubt that the conclusion would have been the same, since she had been properly served with the petition and had taken no steps, so far as the report shows, to ascertain any irregularity in the hearing of the suit until long after the time for appeal had expired, although she had only herself to blame for her ignorance.

I do not think it follows, however, that the same conclusion would have been reached if the facts had been that the proceedings had never been brought to the notice of the appellant wife as in the case which we are now considering. In such a case I cannot see why the mere fact of the remarriage can be a decisive factor, although it is no doubt an important matter to take into account in considering whether, in the exercise of its discretion, the court should set aside voidable proceedings. It is true that the second wife is not to blame for the situation in which she finds herself, but I do not think that analogy of cases decided in contract is helpful. Accordingly, I think she must, therefore, take the husband who claims to be divorced as she finds him, with the necessary consequences which follow if the divorce decree is subsequently avoided. Were it otherwise a spouse could always prevent the opposite party, who had no time or opportunity for appealing from a decree absolute, from availing himself or herself of the provisions of section 31, by remarrying on the day following the decree. In my judgment, the applicant wife should be given leave to appeal from the decrees in this case, and the order for substituted service and the decrees nisi and absolute should be set aside. The case must

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[17] [1936] A.C. 177.

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go back for retrial without further service of the petition, and the respondent to the petition must have time for filing her answer to the petition.

Appeal allowed.
Order for substituted service and subsequent decrees set aside.
Applicant to recover three-quarters of costs of application from Dr. Wiseman.

Solicitors: *Walter Burgis & Co.; Crawley & de Reya for J. C. M. Dyke, Exmouth; Sharpe, Pritchard & Co. for Nichols & Nichols, Exmouth.*

A. W. G.

CROSSLEY *v.* CROSSLEY.

1953
March 11.

Davies J.

Husband and Wife—Custody—Subsequent adoption of child—Whether custody order superseded by adoption order—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *s.* 10.

Once an adoption order has been properly made the adopted child ceases to be the child of any previous marriage. The adoption order extinguishes and supersedes any previous custody order, and the court no longer has power to make an order granting leave to take the child out of the jurisdiction. An application for such leave accordingly becomes unnecessary.

If a custody order is in existence, it is not necessary to apply for the discharge of that order before making an application in the appropriate manner for an adoption order.

SUMMONS (adjourned into court for judgment).

The applicant, then Edith Gertrude Crossley, was granted a decree of divorce against her husband, Victor Henry Crossley, in 1947. It was ordered that the child of that marriage should remain in her custody but should not be removed out of the jurisdiction without the leave of the court. In December, 1950, the applicant married Frederick England, and in April, 1951, the child was adopted by them in accordance with the provisions of the Adoption Act, 1950. The applicant applied for leave to take the child out of the jurisdiction.

Coningsby for the applicant.

Cur. adv. vult.

DAVIES J. This is an application by Mrs. Edith Gertrude England, as she now is, for leave to take what is described in the summons as "the child of the marriage, Brian Michael," out of the jurisdiction of the court for the summer holidays and at any future dates for holidays or otherwise without obtaining further leave of the court. Though the matter is, in my judgment, a very simple one, I have adjourned it into court because there appears to be a certain amount of ignorance, not only amongst litigants but also amongst clerks to magistrates and registrars of county courts, as to what the effect of an adoption order is and as to what are the proper steps that ought to be taken with regard to adoption orders in respect of children who are the subject of an order of this court.

The facts of the present case are extremely simple. [His Lordship stated those facts and continued:] There were, in evidence before me, not only the adoption order but the original birth certificate of this boy and also his new birth certificate, which correctly describes him as Brian Michael "England," not "Crossley." That adoption order having been made, it is only necessary to look at one section of the Act to see what effect that order has. [His Lordship read section 10 (1) and (2) of the Adoption Act, 1950,[1] and continued:] As I read those two subsections, it seems to me that once an adoption order has properly been made the adopted child ceases to be the child of any previous marriage. That is to say, when Mrs. Crossley, as she is correctly called in this summons, because the summons is in the suit, but Mrs. England as she now is, applies for permission to take Brian Michael, the child of the marriage, out of the jurisdiction, it is quite wrong to describe him as "the child of

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[1] Adoption Act, 1950, s. 10 (1): "Upon an adoption order being made, "all rights, duties, obligations and "liabilities of the parents or guardians "of the infant in relation to the future "custody, maintenance and education "of the infant, including all rights "to appoint a guardian and (in "England) to consent or give notice "of dissent to marriage, shall be "extinguished, and all such rights, "duties, obligations and liabilities "shall vest in and be exercisable by "and enforceable against the adopter "as if the infant were a child born "to the adopter in lawful wedlock; "and in respect of the matters afore-"said the infant . . . shall stand to "the adopter exclusively in the posi-"tion of a child born to the adopter "in lawful wedlock."

Subs. (2): "In any case where two "spouses are the adopters, the "spouses shall in respect of the "matters aforesaid, and for the pur-"pose of the jurisdiction of any court "to make orders as to the custody "and maintenance of and right of "access to children, stand to each "other and to the infant in the same "relation as they would have stood if "they had been the lawful father and "mother of the infant and the infant "shall stand to them respectively in "the same relation as to a lawful "father and mother respectively."

"the marriage." He is not. He is the child of Mr. and Mrs. England: he is not the child of the marriage between Mr. and Mrs. Crossley. This court, in my judgment, has no power to make the order which is sought.

By the same token, though I am not deciding what the Passport Office should or should not do, it seems to me that the Passport Office need not concern themselves at all with any order that was made on the decree in this suit when this boy was Brian Michael Crossley, the child of the marriage between Edith Gertrude Crossley and Victor Henry Crossley. He is no longer a child of that marriage. He is the lawful child of Frederick England and Edith Gertrude England. That, therefore, disposes of this summons.

I should like to add this, though this is not strictly germane to the present summons. There have been this term before me a number of applications, and I know that at various times there have been many others before other judges in this Division, in connexion with proposed adoption orders in respect of children with regard to whom there is an order for custody of this court in force. The typical example, and this happens very often, is a case like the present, where a wife divorces her husband, obtains custody of the child or children, thereafter remarries and then seeks to have the child or children adopted by herself and her new husband. The view is apparently taken by some magistrates' courts and by some county courts, who have jurisdiction in this matter, that out of deference to this court the inferior court ought not to proceed to make such an order unless the order of the High Court is first cleared out of the way.

That matter has been dealt with by a direction of the President, and it is in order that the attention of those concerned might be called to that direction that I have adjourned this summons into court. The direction is printed at p. B63 of the Second Supplement to Rayden on Divorce and reads as follows: "Where "a person or persons are desirous of adopting a child in respect "of whom a custody order has been made in the Divorce Division "of the High Court, the application can be dealt with in the "ordinary way at a county court or a court of summary juris- "diction notwithstanding the custody order, provided that the "requirements of the Adoption of Children Acts are complied "with. It is not necessary to obtain the discharge of the custody "order before making the application. The adoption order, "when made, extinguishes and supersedes the custody order and "the child is treated thereafter as the child of the adopter or "adopters."

I hope, therefore, though, as I say, it is not immediately germane to the present summons, that, in future, persons who are seeking to obtain adoption orders in such circumstances will be spared the expense and the trouble of having to apply to this court to discharge the custody order, when it is plain from the direction of the President, with which I respectfully entirely agree, that it is wholly unnecessary to make any such application. If the statutory procedure is complied with, then that is an end of the custody order made in proceedings arising out of an entirely different marriage. On this summons, therefore, I make no order.

Solicitors: *Denton, Hall & Burgin.*

J. B. G.

1953
Mar. 25.

Davies J.

IN THE ESTATE OF LANGSTON, DECD.

Probate — Will — Bequest to "my fiancée" — Subsequent marriage to "fiancée"—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 18—*Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 177.

Where the question arises whether a will has or has not been "expressed to be made in contemplation of a marriage" the test to be applied is this: Did the testator express the fact that he was contemplating marriage to a particular person?

Pilot v. *Gainfort* [1931] P. 103; 47 T.L.R. 376; *Sallis* v. *Jones* [1936] P. 43; 52 T.L.R. 113; *In re Knight* (1944) (unreported) followed and applied.

PROBATE MOTION.

The testator, Herbert Edgar Langston, was a widower whose first wife had died in July, 1935. On November 4, 1935, he executed his last known will, and on January 7, 1936, he married the sole beneficiary, the applicant on this motion. He died on December 28, 1952.

By his will he directed: "All my just debts funeral and testamentary expenses to be paid and satisfied by my executrix "hereinafter named as soon as conveniently may be. After my "decease I give devise and bequeath unto my fiancée Maida "Edith Beck of 108 Regents Park Road, London, N.W.1 . . ."

(The deceased left her everything and appointed her sole executrix of the will.)

The question accordingly arose whether this will had been revoked by the marriage.

John Mortimer moved the court for a grant of probate of the will. The only persons other than the applicant who were interested in the estate upon an intestacy were three nieces who had signed consents to the motion. The cases which he cited are referred to in the judgment.

DAVIES J. stated the facts and continued: The point that makes this motion necessary will be obvious to those familiar with the relevant statutes. By section 18 of the Wills Act, 1837, so far as it is relevant, it is provided that: "Every will made by "a man or woman shall be revoked by his or her marriage." But it was provided by section 177 (1) of the Law of Property Act, 1925 (which, of course, applies in the present case as the will was made after 1925), that: "A will expressed to be made "in contemplation of a marriage shall, notwithstanding anything "in section 18 of the Wills Act, 1837, or any other statutory "provision or rule of law to the contrary, not be revoked by the "solemnization of the marriage contemplated." The material words there are, of course, "expressed to be made in contemplation of a marriage."

The relevant words in this present will are these: [His Lordship read them and continued:] The question which arises is whether that will, by reason of the expression "unto my fiancée "Maida Edith Beck," is a will "expressed to be made in contemplation of a marriage" so as to remain valid after the marriage which was solemnized between the applicant and the testator on January 7, 1936, or not. In the latter event it is, of course, subject to the general provision of section 18 of the Wills Act, 1837, and there would be an intestacy.

The only persons other than the applicant who are interested in this estate upon an intestacy are three nieces of the deceased, and they have all (and one is not surprised having regard to the circumstances) signed consents to this application.

Mr. Mortimer cited three authorities to me upon which I am satisfied that, as a matter of law, I can come to a decision which I feel gives effect to what the testator would undoubtedly have desired.

The first is a case in 1931 before Lord Merrivale P., *Pilot* v. *Gainfort.*[1] In that case the testator's wife had disappeared. Some years later the testator had set up home with another woman and had lived with her as his wife. Having so lived with her for about three years, he made a will in February, 1927, of which the material portion was as follows: " I herewith bequeath and leave " to Diana Featherstone Pilot my wife all my worldly goods." On August 15, 1930, seven years having elapsed since the disappearance of the testator's wife, he married the lady with whom he had been living for some years, being I suppose advised that he would have a defence to a charge of bigamy if the first wife reappeared.

The material words there were " my wife." The woman was not his wife at the date of the will. It was held by Lord Merrivale P., who had first decided (for otherwise, of course, this point would not have arisen) that the marriage between the testator and the woman with whom he had been living at the time when he made the will was a valid marriage, and that the will would therefore otherwise be caught by the provision of the Act of 1837, that the use of the words " my wife " in those circumstances was the expression of a contemplation of marriage to that particular woman. Lord Merrivale P. summarized his conclusion at the end of a very short judgment in these words [2]: " Under the circumstances I do not think that it can be doubted " that the will was in contemplation of the subsequent marriage " and practically expresses that contemplation and is good."

That decision, on the particular facts, has been criticized in Theobald on Wills, 10th ed., at p. 37. But the test there applied by the President was whether there was a practical expression of the fact of a contemplation of marriage, and in my opinion the proper test is this: Did the testator express the fact that he was contemplating marriage to a particular person?

The authority for the words " particular person " is to be found in the next case which was cited to me, namely, *Sallis* v. *Jones.*[3] In that case Bennett J., who was for the time being sitting in this Division, held against the will. The expression used in that will made before marriage was: " this will is made " in contemplation of marriage."

At the conclusion of his judgment Bennett J. says this [4]: " In " my judgment section 177 of the Law of Property Act, 1925,

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[1] [1931] P. 103; 47 T.L.R. 376.

[2] [1931] P. 103, 104.

[3] [1936] P. 43; 52 T.L.R. 113.

[4] [1936] P. 43, 46.

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"upon its true construction excludes the operation of section 18 of "the Wills Act if the will made before a marriage is expressed "to be made in contemplation of a particular marriage and is "followed by the solemnization of that marriage." He said that that principle excluded the will under consideration in that case because, to quote the judgment again,[5] "All that is to be "found in the present will is a declaration that the will was made "'in contemplation of marriage' and nothing more."

The last authority that was cited to me is an unreported case which is referred to in a note at p. 25 of the 19th ed. of Tristram & Coote's Probate Practice, *In re Knight*,[6] decided in 1944, where, according to the textbook, "By his will the testator gave all his "estate 'to E.L.B. my future wife.'" Thereafter he married E.L.B., and it was held that the will was not revoked by that marriage.

Those authorities all seem to me to make it clear that in the present case when the testator used the words "unto my "fiancée Maida Edith Beck" he was expressing a contemplation of marriage to that named lady. *In re Knight*[6] is, in my opinion, a direct authority in favour of the present motion; there is obviously no effective difference between "my future wife" and "my fiancée."

I accordingly hold that this will was so made and was therefore not revoked by the subsequent marriage. There will be a grant of probate as prayed.

Solicitors: *Lindus & Hortin.*

J. B. G.

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[5] [1936] P. 43, 46.

[6] (1944) unreported.

DIXON *v.* DIXON.

1953
Feb. 27;
Mar. 11.

Davies J.

Husband and Wife—Divorce—Res judicata—Cross-allegations on ground of cruelty dismissed—Subsequent cross-allegations on ground of desertion—Application to strike out—Allegations of just cause for leaving and of constructive desertion.

Where the only definite finding in previous proceedings has been upon charges of cruelty which were dismissed, a defence to a charge of simple desertion, and a cross-charge of constructive desertion, based upon conduct previously alleged to constitute the cruelty, cannot be struck out as res judicata.

Edwards v. *Edwards* [1950] P. 8; 65 T.L.R. 419; [1949] 2 All E.R. 145 and *Pike* v. *Pike* [1953] 1 All E.R. 232 considered.

A wife's petition on the ground of cruelty had been dismissed, and the prayer of the husband's answer, in which he, too, alleged cruelty, had been rejected, in previous proceedings between the parties. The husband subsequently presented a petition on the ground that the wife had deserted him when she admittedly left the matrimonial home; the wife by her answer alleged that she had had just cause for doing so, that the husband had by his conduct compelled her to leave, and that he was thereby guilty of constructive desertion. Her allegations were substantially the same as those which she had made in the previous proceedings. On an application to strike out the paragraphs containing those allegations:—

Held, that in view of the present state of the law and the somewhat opposing views expressed in the Court of Appeal in the cases considered, and since the only definite finding in the previous proceedings between the parties had been the dismissal of the charges of cruelty, this was not a case in which the summary course of striking out a pleading, which was only to be taken in plain and obvious cases, should be adopted.

SUMMONS (adjourned into court).

The parties were married on November 8, 1947, and by her petition dated December 8, 1949, the wife prayed for a decree of judicial separation on the ground of the husband's alleged cruelty. The husband by his answer denied cruelty and prayed in turn for a decree of judicial separation on the ground of the wife's alleged cruelty. In March, 1951, Mr. Commissioner Bush-James rejected the prayer of the answer and dismissed the petition on the ground that he had not been satisfied that the charges on either side had been made out. In November, 1952, the husband presented a petition for dissolution on the ground of desertion, alleging that the wife had deserted him without cause on and from July 9, 1949. It was not disputed that the wife had left the matrimonial home on that date and never returned to it.

The wife, in answer to the husband's petition for dissolution, denied the alleged desertion. By paragraph 2 she admitted that she had ceased to live with the petitioner, and added "but she "had and still has just cause for so doing by reason of the parti-"culars herein set out." Of those particulars, particulars (a) to (k) were the same as the allegations of cruelty raised by her in the former suit; particulars (l), (m) and (n), though containing allegations not explicitly raised in that suit, referred to matters which were alleged to have occurred before the wife left the matrimonial home in July, 1949.

In paragraphs 3 and 4 of her answer the wife alleged: "(3) By "such conduct as aforesaid the petitioner evinced an intention "to bring cohabitation between the petitioner and the respondent "permanently to an end and the respondent was thereby compelled on the said 9th July, 1949, to leave the matrimonial "home at ——, and has not returned to cohabit with the petitioner. (4) That the petitioner has deserted the respondent "without cause for a period of at least three years immediately "preceding the presentation of the answer, to wit, from and since "on or about the 9th day of July, 1949, in the circumstances "referred to in paragraph 2 hereof."

In his answer in the previous proceedings the husband had also alleged that if and in so far as he had been guilty of cruelty to the wife she had condoned such cruelty by staying with him until July 9, 1949, when she left him, and that the wife had then deserted him.

Both parties had previously alleged excessive sexual demands and certain sexual practices as acts of cruelty; the commissioner made an express finding upon those allegations, holding that whatever took place took place with the knowledge and consent of both parties. The wife did not repeat such complaints in her answer in the present proceedings.

On February 19, 1953, Mr. Registrar Forbes heard cross-summonses by the two parties. The wife applied for an order to stay the prayer in the petition and for leave to proceed on the prayer in her answer. Her summons was dismissed and she did not appeal against this order. The husband applied for an order to strike out certain matters in the answer, and Mr. Registrar Forbes ordered that paragraph 2 of the answer (except for the admission that the wife had ceased to live with the husband), and the whole of the particulars under that paragraph, should be struck out. He further ordered that paragraphs 3 and 4 of the answer should be struck out. The ground of his decision was that by the paragraphs struck out the wife in her answer to a petition for dissolution on the ground of simple desertion was seeking to set up for a second time matters which had already been determined against her in a former suit.

The wife appealed against this order of the registrar.

Relevant extracts from the judgment of the commissioner are given in the judgment.

R. T. Barnard and *Hollis* for the wife.

Baskerville for the husband.

The cases referred to are cited in the judgment, in which the nature of the arguments is set out.

Cur. adv. vult.

Davies J. stated the facts and said that it was plain that all the matters sought to be raised in the particulars under paragraph 2 of the answer, with the exception of particulars (l), (m) and (n), were precisely the same as the matters which the wife had raised in the former suit. In regard to the last three, it had been pointed out with force on behalf of the husband that although not explicitly raised, they could have been, and it had been submitted, should have been raised, then, since they concerned matters which had occurred before the wife had left the matrimonial home. What the wife was now doing was to seek by paragraph 2 at any rate to raise as constituting just cause for leaving her husband the same matters as those upon which she had relied as constituting acts of ill-treatment for the purpose of founding a charge of cruelty in the former suit, with the exception of the sexual matters upon which an express finding had been made. With regard to the allegation of desertion in the husband's answer in the previous proceedings he (his Lordship) said that that charge had presumably been made for the purpose of reviving earlier acts which had been condoned.

[His Lordship continued:] Mr. Baskerville's main contention on this summons in support of the order of the registrar is this. He says that as the commissioner decided in the former suit that the acts which the wife now seeks to plead did not amount to cruelty, they cannot now be relied upon by her as constituting either constructive desertion on the part of the husband or just cause for her leaving him so as to constitute a defence by her to his charge of simple desertion. He also contends, though this is not really in the forefront of his case as I understand it, that just as in the former suit the husband alleged that by deserting him the wife had revived any earlier acts which she had committed, so also the wife could have alleged that her departure on July 9, 1949, was caused by the husband's conduct and constituted as it were constructive desertion by him then, so as to revive any acts which he had previously committed. He also contends that if Mr. Commissioner Bush-James had been of the opinion in the former suit that the wife was entitled by reason of the husband's conduct to leave him, the commissioner would have said so. Finally, he argues that as in any event the wife in the former suit could have pleaded that she had just cause for leaving her husband but did not so plead, she cannot be heard to make that contention now. He also points out with great force that it is a great hardship to the husband to have these allegations tried all over again. In the previous suit the husband was ordered to pay his wife's costs up to the amount of the security, which was £300. I think the hearing took two days. Mr. Baskerville asks why at the end of it all the husband should be put to the expense of having all these matters litigated again with, it is to be presumed, leading counsel on either side as was the case on the former occasion. Therefore, says Mr. Baskerville, the summary procedure of striking out is the proper and appropriate one in this case.

I think it is right and essential that I should look at the judgment of the commissioner in the former suit. It is a very short judgment consisting as it does of about two and a half foolscap pages. After reciting the history of the parties, which takes the first page, he deals in the next two paragraphs with the sexual matters with which we need not further concern ourselves in this summons: I have explained what happened about those. Then, with regard to what I might call the other cruelty, he said this: "The husband is a man of a cantankerous nature and a "pugnacious nature, and I do not think at his age that he is at "all a fit subject for matrimony. Be this as it may, the wife "entered into this marriage with her eyes open. I think that "she is capable of taking care of herself. Had she been sub-"jected to the conduct to which she now says she was subjected, "her remedy would have been simple: she could have taken "refuge with her mother in the Isle of Man." I do not know whether the commissioner is talking there about the sexual matters or the other matters. I rather think he means sexual matters because at the end of his judgment, having explained that they lived together as man and wife before the marriage, he said: "She was a woman of 37, of business and sex experience, "and far from being unsophisticated; and it was with her eyes "open that she contracted this marriage." One would have thought that the expression "with her eyes open" was more apposite to sexual eccentricities than to physical violence. However, he went on: "In support of the wife's evidence"—and this is not in reference to sexual matters but to other acts of alleged cruelty—"I have the evidence of the two maids who were "serving in the matrimonial home, who say that the matrimonial "home was an unhappy one; that the husband was in the habit "of slamming doors and windows and behaving in an unrestrained "manner. I accept their evidence in its entirety. In addition, "I have the evidence of two policemen called to the house on "two separate occasions, when they found the husband in a "temper and the wife distressed. I think that is really the "substance of the case, apart from the evidence by the doctor "of the maltreatment."

I pause there to say that it is unfortunate for anybody who has got to decide this application that the commissioner did not say what the doctor's evidence was, or state his finding about it. I imagine that when he spoke of "the evidence by the doctor "of the maltreatment," what he must have meant was evidence by the doctor of having seen things which might have been occasioned by maltreatment. At any rate, we are left in the dark as to what that evidence was, and so I do not know whether he was finding that there was physical injury or that there was not.

He continued: "I do not propose to go into all these details "of sexual malpractices. The husband says she was a woman "of violent temperament; that on various occasions she assaulted "him, and that once she kicked him violently on the backside. "Well, there it is. I cannot decide the case on any balance of "probabilities. The burden of proof lies upon the party making "the allegations. The husband's daughter by his first marriage, "Mrs. Gibbs, who has been called before me—and I accept her "evidence—says that her stepmother was on occasion uncontrolled and that on at least one occasion she insulted her late "mother by calling her a prostitute; and I think that that is a "fact. I think this case is far from being made out on either "side. I therefore reject the prayer of the answer and dismiss "the petition."

Now, as I say, it is a little difficult to know whether the commissioner, sex matters apart, was saying that he is not satisfied that the acts took place or that he was saying (and I think this is highly improbable) that he was not satisfied that they were the kind of acts that could amount to cruelty, or that he was saying that he is not satisfied that they did amount to cruelty within the well-known definition in *Russell* v. *Russell*[1]; that is to say he was not satisfied that there was any actual injury or reasonable apprehension of injury to the bodily or mental health of the wife. I do not know what he decided save that the case was not made out.

Mr. Baskerville has cited to me the well-known authority of

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[1] [1897] A.C. 395; 13 T.L.R. 516.

Hoystead v. *Commissioner of Taxation.*[2] Lord Shaw, in giving the opinion of the Judicial Committee, cited[3] the well-known passage from *Henderson* v. *Henderson* on res judicata[4]: " 'I believe I state the rule of the court correctly, when I say, " 'that where a given matter becomes the subject of litigation " 'in, and of adjudication by, a court of competent jurisdiction, " 'the court requires the parties to that litigation to bring forward " 'their whole case, and will not (except under special circum- " 'stances) permit the same parties to open the same subject of " 'litigation in respect of matter which might have been brought " 'forward as part of the subject in contest, but which was not " 'brought forward, only because they have, from negligence, " 'inadvertence, or even accident, omitted part of their case. " 'The plea of res judicata applies, except in special cases, not " 'only to points upon which the court was actually required by " 'the parties to form an opinion and pronounce a judgment, " 'but to every point which properly belonged to the subject of " 'litigation, and which the parties, exercising reasonable dili- " 'gence, might have brought forward at the time.' " Counsel also cited the much more recent case of *Greenhalgh* v. *Mallard*,[5] which it is not necessary for me to quote. Finally he referred me to a case in this Division where the principle was applied, *Finney* v. *Finney.*[6]

The point in *Finney* v. *Finney*[6] was that a wife had petitioned unsuccessfully for a judicial separation on the ground of cruelty. Having failed in that petition, she subsequently, it appears, obtained evidence on which she was able to make a charge of adultery, and she then sought to petition for a decree of dissolution on the then essential double ground of adultery and cruelty, the cruelty being the same cruelty which she had already charged in the judicial separation suit. Not surprisingly, the court held that she could not re-litigate that same charge of cruelty which she had litigated before and which had been decided against her.

The real cornerstone of Mr. Baskerville's argument in this case, though it was cited to me in the argument of Mr. Barnard, who presented his case first and thought it necessary, as indeed it was, to deal with the strongest authority on the other side before he dealt with his own authorities, was the recent decision in the Court of Appeal of *Pike* v. *Pike.*[7]

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[2] [1926] A.C. 155; 42 T.L.R. 207.

[3] [1926] A.C. 155, 170.

[4] (1843) 3 Hare 100, 114.

[5] [1947] 2 All E.R. 255.

[6] (1868) L.R. 1 P. & M. 483.

[7] [1953] 1 All E.R. 232.

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DIXON v. DIXON.

Davies J.

In considering *Pike* v. *Pike* [7] it is important to consider the issue which was before the Court of Appeal in that case. As I understand it, what had happened was this. A wife's petition alleging constructive desertion by the husband was heard by Mr. Commissioner Goodman-Roberts, and he granted the wife a decree on the ground of constructive desertion. The husband appealed against that decree; the appeal was allowed and the decree was set aside. It is important to notice that the husband did not cross-petition in that case; he had not alleged that his wife had deserted him, and therefore the Court of Appeal were not expressly, at any rate, considering whether or not the wife had just cause for leaving her husband. With that observation to be made about *Pike* v. *Pike* [7] it is also to be noticed that in *Pike* v. *Pike* [7] *Edwards* v. *Edwards* [8] was not cited, although it is naturally to be expected that the court must have had *Edwards* v. *Edwards* [8] in their minds. Having said that, there is no doubt at all that if the observations made by two of the members of the Court of Appeal in *Pike* v. *Pike* [9] are to be taken at their face value (and I am, of course, bound by them if they form a part of the decision of the court), they constitute strong authority in favour of Mr. Baskerville's proposition that the wife cannot in this suit rely for a second time on the acts which she had previously pleaded.

I need not read the whole of the judgment in *Pike* v. *Pike* [9] of Hodson L.J., who gave the first judgment. I think it will suffice if I start reading at the top of p. 235 of the report: "The "commissioner found inferentially, if not expressly, that the "husband's requests to the wife to return were not genuine, and, "accordingly, he found that the husband had driven the wife from "the house, and so was guilty of desertion. In my judgment, "that decision cannot stand. The case of driving away made "out by the wife was substantially different from that pleaded, "both in substance and also in time. There was no evidence of "privation, on which the commissioner relied in part. Apart "from this, there was no other grave and weighty matter relied "on as amounting to constructive desertion unless it consisted "of cruelty. No cruelty was alleged in terms, and the serious "allegation of threatening to choke the wife was not referred to "at all in the petition, and, moreover, there was no corroboration "of that charge. I want to make it as clear as I can that when

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[7] [1953] 1 All E.R. 232.

[8] [1950] P. 8; 65 T.L.R. 419; [1949] 2 All E.R. 145.

[9] [1953] 1 All E.R. 232.

"the case sought to be made is in the nature of a case of cruelty, "it is not possible to build up a case of constructive desertion by "what is really a case of unproved cruelty. That, of course, does "not cover the whole area of constructive desertion, for grave "and weighty matters might be alleged which are quite different "in kind and quite as serious, if not more serious, than cruelty. "One has in mind the well-known case of *Russell* v. *Russell*,[10] "where false charges were made, persisted in, and not withdrawn, or, of course, one can take the simple case of constructive "desertion where there is an order or direction by one spouse to "the other to leave. If that order is obeyed and the direction "is followed and not withdrawn, then, again, desertion may run. "This case was never made out on those lines. On that basis "the finding cannot stand. If it should be said that there was "a case of cruelty, and the matter, although not specifically "raised, was dealt with between the parties, and, therefore, that "the remedy open to the husband in this court is to obtain an "order for a new trial, my answer is that in this case that is not "the right way in which to proceed. A serious charge like a "charge of cruelty which is, after all, the substantive case which "the wife was trying to make, ought to be pleaded as such and "dealt with as such, and no injustice could possibly be done to "her, because if she has a case of cruelty, any finding of this "court that she has not made out a case of desertion does not "operate as an estoppel in any cruelty proceedings which she "may, if so advised, bring in the future. No charge of cruelty "has been disposed of either in the court below or in this court."

Pausing there for one moment, it may be thought that those two last sentences are not altogether inapposite to the point in the present case. For it does appear that Hodson L.J. was there saying that although the wife was not entitled to set up those matters as constructive desertion she could if she liked set them up again as a substantive charge of cruelty in another suit, since the issue of cruelty had not been dealt with. If that is to be applied here, and I am not sure that it is, it would seem to me that the fact that these acts have been passed upon by Mr. Commissioner Bush-James between the present parties on a charge of cruelty does not necessarily prevent the wife from setting them up again for the purpose which she now seeks to do.

Denning L.J.'s judgment was even more emphatic than Hodson L.J.'s, if I may use that expression without disrespect. He said [11]: "If he had previously treated her with cruelty, so much "so that there was a reasonable apprehension of injury to her if "she went back, she would, of course, be justified in refusing to "go back, but, if his conduct was less than cruelty recognized "by law, I do not think she was justified. There may be "conduct different from cruelty—not less than it—which gives "her reasonable cause for staying away, as in *Russell* v. "*Russell*,[12] but even such conduct does not automatically make "him guilty of desertion. . . . In the circumstances of this "case, the husband's conduct was either cruelty or it was not. "It was not something different from cruelty. For the wife to "justify her refusal to return, the only thing she could rely on "would be the husband's cruelty, and in such a case cruelty "must be pleaded and proved." Then right at the end Denning L.J. said that if the wife wished to rely on cruelty [13] "her proper "course would be to charge cruelty. It is open to her, no "doubt, to bring another petition charging cruelty, but I certainly "would not wish to encourage it."

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[10] [1897] A.C. 395.

As I say, that case is, I think, on the whole strong authority for the proposition which Mr. Baskerville argues. But there is at least one authority in the Court of Appeal which seems to be the other way. That case is the one to which I have already referred, *Edwards* v. *Edwards*.[14] Before I cite it, I ought to refer to one other and much earlier case which seems relevant to the present problem, *Butland* v. *Butland*.[15] In that case the wife petitioned for a decree of restitution. The husband alleged that the wife drank to excess and that she had been guilty of cruelty. The finding of the jury was that the wife had been guilty of physical violence but that it was not cruelty, that the wife did drink to excess and that it was not unsafe at the time when the husband left the wife for the parties to live together. A somewhat odd finding of the jury; but there it is, that was the finding. Bargrave Deane J. said [15]: "The respondent husband did not establish cruelty, but only "such conduct on the part of the petitioner wife as would justify "the court in refusing her a decree of restitution. The whole "trouble was brought upon the parties by the wife's conduct. "She drank to excess, and when under the influence of drink "acted in such a way to the husband as led the jury to find that "she had been guilty not of cruelty but of physical violence

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[11] [1953] 1 All E.R. 232, 235.
[12] [1897] A.C. 395.
[13] [1953] 1 All E.R. 232, 235.
[14] [1950] P. 8.
[15] (1913) 29 T.L.R. 729.

" towards him "—acts of a similar kind to but, apparently, if I may use the words, less than cruelty. " I do not think the " parties should be made to come together again. As regards " the respondent, I do not think his charge of cruelty was " established. The wife's petition will be dismissed." There you have got a case where the husband failed to prove that his wife had been guilty of cruelty, but the wife was refused a decree of restitution; in other words, the husband had just cause for leaving her.

The matter was considered at some length in *Edwards* v. *Edwards* [16] in the Court of Appeal. It was an appeal from Mr. Commissioner Grazebrook. The statement of facts shows that the commissioner found that the wife had failed to prove cruelty, but that she had proved a course of conduct by the husband which justified her in leaving him in 1930. Accordingly, the wife had not deserted her husband without cause. There are other matters that do not concern this particular case. It is interesting to note that the argument of Mr. Reader Harris, who appeared for the wife, was as follows: " The commissioner's judgment is " right. He has found as a fact that the wife was justified in " leaving her husband in 1930. The reason for her leaving was " her husband's violence towards her which the commissioner " found did not amount to 'cruelty.' But violence short of " cruelty can constitute such a grave and weighty matter as to " justify a spouse in withdrawing from cohabitation." A reference to *Butland* v. *Butland*,[17] to which I have just referred, follows.

Bucknill L.J. gave the leading judgment in *Edwards* v. *Edwards* [18] and quoted the commissioner's judgment [19]: " ' Then " ' comes the question of the wife leaving her husband, which is " ' on a somewhat different footing because in regard to that it " ' would not be necessary for her to have to prove cruelty; it " ' would be necessary for her to prove some course of conduct " ' which justified her in leaving her husband. There again I am " ' satisfied that she did leave her husband by reason of some " ' treatment of his, and I am satisfied to that extent that she was " ' justified in leaving him.' " The other points do not matter. The Lord Justice went on: " Counsel for the husband, as I " understand his argument, has put forward three points. The " first is one of law, namely, that, on the judgment of Hodson J. " in *Barker* v. *Barker*,[20] it was not open to the commissioner to

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[16] [1950] P. 8.

[17] 29 T.L.R. 729.

[18] [1950] P. 8.

[19] Ibid. 10.

[20] [1949] P. 219; 65 T.L.R. 49; [1949] 1 All E.R. 247.

"find that the wife had justification for leaving her husband, "once he had decided that he was not satisfied that the case of "cruelty alleged by the wife had been made out. The second "point was that, on the facts, the commissioner was wrong in "holding that there were sufficient grounds to justify the wife in "leaving. The third point was, that the commissioner's judgment was illogical because, if there were sufficient grounds for "the wife to leave the husband, then the husband himself was "a constructive deserter and, that being so, the wife ought to "have succeeded in her plea for a judicial separation on the "ground of the husband's desertion." Bucknill L.J. then went on to deal with the first point, which does seem to me to be precisely the point in question in the present case, namely, whether it is open to a court to find that acts of violence while not amounting to cruelty may yet constitute just cause for the complaining spouse to leave. He cited *Russell* v. *Russell* [21] and, after quoting the judgment of Lopes L.J. in the Court of Appeal,[22] said this [23]: "It is plain that the Lord Justice is there "saying in effect that the husband has failed to make out a case "of cruelty against the wife, but that nevertheless her conduct "towards him would prevent her from contending that the "desertion was without cause. In other words, there can be "sufficient cause for desertion which falls short of legal cruelty." I suppose that it might well be said, as indeed it has been said, that the acts of the wife in *Russell* v. *Russell* [24] were different in kind from cruelty and were not merely acts falling short of cruelty.

Bucknill L.J. then cited *Oldroyd* v. *Oldroyd*,[25] where Gorell Barnes J. said: "The effect of that case"—that is, *Russell* v. *Russell* [26]—"appears to be that in cases where the "conduct of the petitioner has led to desertion by the respondent, "and has amounted to sufficient cause to disentitle the petitioner "to maintain a suit for judicial separation on the ground of "desertion, the court is now empowered to refuse to pronounce "a decree compelling the respondent to return to cohabitation "with the petitioner. The truth is that in such cases it has "become practically impossible for the spouses to live properly "together." Next, Bucknill L.J. quoted the well-known passage by Lord Greene M.R. in *Buchler* v. *Buchler*.[27] The only sentence I need read from his judgment is where Lord Greene M.R. was referring to the argument of Sir Valentine Holmes: " But he "— that is, Sir Valentine—" eventually found himself compelled to " agree that conduct short of an actual matrimonial offence might " be sufficient. In this I agree with him." Bucknill L.J. also cited the passage in the judgment of Asquith L.J.[28]: " To afford " such justification the conduct of the party staying on need not " have amounted to a matrimonial offence, such as cruelty or " adultery."

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[21] [1897] A.C. 395.
[22] [1895] P. 315, 334.
[23] [1950] P. 8, 11.
[24] [1897] A.C. 395.
[25] [1896] P. 175, 184; 12 T.L.R. 442.
[26] [1895] P. 315.

The next case that Bucknill L.J. dealt with was *Barker* v. *Barker*.[29] *Barker* v. *Barker* [29] was a case in the Divisional Court in which *Buchler* v. *Buchler* [30] had not been cited. In that case Hodson J. said this [31]: " Mr. Sleeman said on the other branch " of the case, namely, wilful neglect to maintain, as I think he " was bound to say in this case, that something less than cruelty " would justify a wife remaining apart from her husband. I " think that that is an unsound proposition. It will not do to " say that because a grave and weighty matter will justify one " spouse in leaving the other, therefore something less than " cruelty will do." Bucknill L.J. proceeded [32]: " If Hodson J. " meant to say that, once a charge of cruelty has failed to be " established, it is impossible for a wife to establish grounds " justifying her refusing to live with her husband, with great " respect to him I think that inconsistent with the decisions to " which I have referred, and that this court ought to follow " *Russell* v. *Russell* [33] and *Buchler* v. *Buchler*.[34] I think, " however, that that is not what Hodson J. meant to say. What " I think he meant to say was that either the blows inflicted by " the husband on the wife amounted to cruelty in that they " injured her health or were likely to injure her health, or they " were not of such a nature. If they were not of such a nature " then, there being no other evidence in the case at all, the court " ought not to say that although they were trivial blows in effect, " they justified the wife in leaving her husband."

To the same effect was the passage in the short judgment of Cohen L.J., who said with reference to the judgment of

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[27] [1947] P. 25, 30; 63 T.L.R. 100; [1947] 1 All E.R. 319.

[28] [1947] P. 25, 45.

[29] [1949] P. 219.

[30] [1947] P. 25.

[31] [1949] P. 219, 225.

[32] [1950] P. 8, 14.

[33] [1897] A.C. 395.

[34] [1947] P. 25.

Mr. Commissioner Grazebrook[35]: "I do not think that he is "there saying that the facts alleged are not proved, but that, "whether or not the acts were proved, they did not have the "effect on the health of the wife requisite to justify giving her "any relief on the ground of cruelty. He must have found that "some of the acts which constituted the alleged cruelty had "in fact been committed by the husband; otherwise he could not "have found that she was justified 'to that extent,' which I "think means 'in this respect,' in leaving him."

Edwards v. *Edwards*,[36] therefore, does not seem to me to be a direct decision in favour of the proposition contended for by Mr. Barnard in the present case with regard to paragraph 2 of the wife's answer.

This being the state of the law, with those two somewhat opposing views being expressed in the Court of Appeal and with the judgment of the commissioner in this case being short and not making it, as I have said, very clear exactly what he did find, save that he dismissed the charges of cruelty, it seems to me that it is utterly impossible for the summary course of striking out a pleading to be adopted here. As we all know, there is abundant authority for the proposition that the summary course of striking out a pleading is only to be taken in plain and obvious cases. In my judgment, it is impossible to say that the present case is a plain and obvious one. I have the utmost sympathy with the husband, who may well, in any event, have to put his hand deeply into his pocket again if these matters are litigated, but I cannot see that I ought to allow that consideration to influence the view which I have formed as to the proper course to be adopted in this case.

What I have said covers paragraph 2. Paragraphs 3 and 4 are slightly different in that they involve not the defence of just cause but a counter-charge of constructive desertion. It seems to me that there is a good deal more to be said in favour of the husband's argument on those paragraphs than there was on paragraph 2, but even with regard to those I am not satisfied that the law is so clear that this summary remedy ought to be adopted. I am consoled with regard to this part of my decision by the reflection that any expense which may be involved in the decision of the issue upon the facts alleged in paragraph 2 will not, I apprehend, be increased in any way

[35] [1950] P. 8, 16.

[36] [1950] P. 8.

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by the matters alleged in paragraphs 3 and 4; for, in effect, paragraphs 3 and 4 are merely an alternative way of putting the consequences in law of any facts which may be proved under paragraph 2. I therefore allow the appeal in toto, both in regard to paragraphs 3 and 4 and in regard to paragraph 2. Accordingly, the appeal will be allowed with costs here and below. I give leave to appeal.

Appeal allowed.

Solicitors: *Bernard Oberman & Co.; Courtenay Croome & Finch.*

J. B. G.

THOMAS STONE SHIPPING LD. *v.* ADMIRALTY AND OTHERS.

THE ALBION.

C. A.

1952
Dec. 1, 2, 3, 4, 5, 8, 9, 10.
1953
Mar. 13.

Somervell, Jenkins and Hodson L.JJ.

Shipping—Collision—Hull of aircraft carrier (in tow) with steamship — Aircraft carrier alone to blame — Defective port side light — Whether bound to exhibit "not-under-command" lights—Defective planning in putting to sea in conditions indicated by falling barometer—Failure to broadcast warnings to shipping—Liability—Apportionment between shipbuilding contractors and towage subcontractors—Regulations for Preventing Collisions at Sea (S.R. & O., 1910, *No.* 1113), *arts.* 4 *and* 29—*Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 419 (1).

The uncompleted aircraft carrier *Albion,* which was without power or steering capacity, was being towed by three tugs on a voyage from the Tyne to Rosyth. During the voyage she met with bad weather which caused her to lie about at a right angle athwart her proper course, but she did not become disconnected from her tugs. During the hours of darkness she collided with the steamship *Maystone,* which was bound on a course almost opposite to that set by the towage flotilla, and as a result the *Maystone* sank, with loss of life. Willmer J. found ([1952] W.N. 292; [1952] 1 Lloyd's Rep. 38) that the *Albion* was alone to blame for the collision, inter alia, because she failed to exhibit "not-under-command" lights. On appeal, on the question of not-under-command lights:—

Held, (1) that, since the *Albion* belonged to the Crown, the Regulations for Preventing Collisions at Sea did not apply to her (nor, because she was not commissioned, did the Queen's Regulations), but the Collision Regulations should be taken to contain a standard of care to which she should have conformed; (2) that

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there was no moment of time at which it could be said that she had suffered an accident, and, accordingly, article 4 of the Collision Regulations was in any event inapplicable, although she was not under command (applying the test enunciated by Lord Finlay in *The Mendip Range* [1921] 1 A.C. 556, 571; 37 T.L.R. 474, and distinguishing *The Matfen,* The Times, May 23, 1913); but (3) that by virtue of article 29 of the regulations the ordinary practice of seamen required her to exhibit "not-under-command" lights or some practicable form of deck illumination visible to oncoming traffic; and (4) that section 419 (1) of the Merchant Shipping Act, 1894, did not prohibit such illumination—it meant only that, for the purposes covered by the regulations, the lights as prescribed must be used and no others.

APPEAL by the Admiralty, as owners of the *Albion*, from a judgment of Willmer J. delivered on December 20, 1951,[1] whereby he held that the *Albion* was alone to blame for a collision which occurred between the *Albion* and the steamship *Maystone* on October 18, 1949.

APPEALS by Swan, Hunter & Wigham Richardson Ld., as the builders in possession of the *Albion* from the judgment of Willmer J. as above stated, and from his judgment delivered on January 28, 1952[2]; and by France, Fenwick Tyne & Wear Co. Ld., as the towage sub-contractors of the *Albion* in respect of the same matter.

In the early hours of the morning of October 18, 1949, the steamship *Maystone*, of 2,025 tons gross, 290 ft. in length and 40 ft. in beam, while on a voyage from Methil to the Thames laden with a cargo of coal, came into collision off the north-east coast of England, five miles north-by-east magnetic from the Longstone lighthouse, with the uncompleted aircraft carrier *Albion*, in consequence of which the *Maystone* sank with the loss of all but four of those on board. None of the survivors was on watch at the time of the collision. The *Albion* at the time in question was no more than a hulk; she was without power and without any steering capacity. Her length was 732 ft. and her beam 90 ft. She was in charge of a skeleton crew, consisting of a master, one officer, and 14 riggers. She was being towed by three tugs and was bound from the Tyne to Rosyth for the purpose of entering a drydock. The three tugs which were towing her were the *Hendon*, the *George V* and the *Beamish*, all of which belonged to France, Fenwick Tyne & Wear Co. Ld.

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[1] [1952] W.N. 292; [1952] 1 Lloyd's Rep. 38.

[2] [1952] W.N. 294; [1952] 1 Lloyd's Rep. 104.

The plaintiffs in the action were the owners of the *Maystone*, and the first defendants, the Admiralty, were the owners of the *Albion*. The second defendants were Swan, Hunter & Wigham Richardson Ld. (hereinafter referred to as Swan Hunters) who were the builders of the *Albion*, in whose hands she was—at any rate up to the time of her departure on the voyage from the Tyne to Rosyth—and at whose instigation the voyage was undertaken. The third defendants were France, Fenwick Tyne & Wear Co. Ld. (hereinafter referred to as France Fenwicks), who were the owners of the tugs *Hendon*, *George V* and *Beamish*, and who undertook the towage of the *Albion* from the Tyne to Rosyth. The fourth defendants were the firm of Captain Frank McNulty & Son, who were engaged by France Fenwicks to supply a master, one officer and riggers to form a skeleton crew for the *Albion*. The fourth defendants succeeded in their defence and were not concerned with the present appeals.

Electric lamps for the sidelights and stern light were placed on board the *Albion* by France Fenwicks. The lights admittedly were not of regulation pattern. In fact, they were converted oil lamps in which, in place of the fitting for a wick, a fitting for an electric light bulb had been fitted supplied with current from a 2-volt battery.

France Fenwicks obtained the ordinary weather forecasts for October 15, 16 and 17 which were entirely favourable, and the *Albion* left the Tyne on the morning of the 17th in tow of the three tugs towing with a scope of hawser of 170 to 175 fathoms. Shortly after her departure a broadcast gale warning was received, but by that time the vessel was already at sea, and it was too late to postpone her departure or recall her.

The wind, which was from a point just east of southward, reached gale force during the night, which was fine and clear but overcast and very dark, of 17–18th and, at about 5 a.m. the *Maystone* and the *Albion* came into collision. At the time of the collision each of the tugs which were towing the *Albion* were exhibiting towing lights and also the usual sidelights; one of the tugs was exhibiting the normal signal of two towing lights, and the other two tugs three towing lights; they were also exhibiting the usual stern and sidelights. The *Maystone* was exhibiting two masthead lights and both the usual sidelights. The first point of contact between the two vessels was the stem of the *Maystone* with the port side of the *Albion* about 70 feet forward from the extreme after end. The angle of the blow was agreed between the surveyors to be approximately a right angle. It was admitted that although a course of N.W.½N. was set and steered by the tugs, the *Albion* was not following anything like directly astern of them, but that she had a pronounced sheer to starboard, substantially athwart the course of the flotilla.

The Admiralty counterclaimed in respect of damage suffered by the *Albion* against the owners of the *Maystone*, secondly, or in the alternative, against France Fenwicks and McNulty & Son. They alleged, as did all the defendants, that the collision was due to the fault of the *Maystone*. Both the Admiralty and Swan Hunters said, further, that the collision was due to the fault of either or both France Fenwicks and McNulty & Son.

On December 20, 1951, Willmer J. held the *Albion* alone to blame for the collision. He found that the collision happened while the *Maystone* was running on her course. He did not find that the *Maystone* ported. For some reason or another she did not see the *Albion*. That might be due to the fact that the *Maystone* was keeping no lookout, but he (Willmer J.) thought that the most obvious explanation of it would be that there was no visible light on the *Albion* for her to see. He was quite unable to reject the evidence of Captain McNulty that the red light of the *Albion* was in fact alight and burning but he found that it was defective. In the circumstances he could not say that there was any fault on the part of the *Maystone* in failing to see it, and in the absence of any other lights of any description at all, she had no warning that an object of the size and shape of the *Albion* was astern of the tugs and in such a position as to lie across the course of the *Maystone* herself. He could do no other than find that the defective port light of the *Albion* contributed to the collision. He was satisfied and on the advice of the Elder Brethren that, with proper towage assistance, and with a proper disposition of the tugs, it would have been unnecessary for the *Albion* to be towed lying athwart the course of the flotilla.

There were three points which must be considered together, namely: (1) the defective port side light; (2) insufficient towage assistance and improper disposition of the tugs; and (3) failure of those responsible for the expedition to obtain long range weather forecasts or to send out wireless warnings of the difficulties the vessel was meeting. Those three points must be considered together. None of them individually would be enough to sustain a charge of negligence against the *Albion* or against those responsible for the initiation of the expedition. When taken together

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they revealed a lamentable failure to appreciate and provide in advance for the hazards which might be encountered on the voyage, and constituted a breach of duty which those who organized the expedition owed to other ships including the *Maystone*.

It was said by the plaintiffs that the deck of the *Albion* should have been illuminated. He (Willmer J.) was unable to find any duty to do that. On the contrary, it seemed to him that, had anything of the sort been done, it would certainly not have been within the provisions of the Collision Regulations, and might, indeed, be regarded as a direct breach of the provisions of section 419 of the Merchant Shipping Act, 1894. At any rate he was not prepared to find any fault on the part of the *Albion* in that respect.

Coming to the question of "not-under-command" lights which, on the evidence, were available for use on board the *Albion* and, admittedly, were not exhibited by the *Albion*, they would have constituted a clear warning to the *Maystone* as to the nature of the tow she was approaching. The matter was governed by article 4 of the Collision Regulations, which provided: "A vessel "which from any accident is not under command shall carry at "the same height as the white light mentioned in article 2 (*a*), "where they can best be seen, and, if a steam vessel, in lieu of "that light, two red lights, in a vertical line one over the other."

The operative words of that article which had to be considered in the present case were: "A vessel which from any accident is "not under command." As was said by Sir Gorell Barnes P. in *The Bellanoch*,[3] the question whether in any given case "not-"under-command" signals ought to be exhibited was partly one of the construction of article 4 and partly one of fact in the particular case.

The question as to the meaning to be attached to the words "from any accident" was raised before him in the present case, it was believed for the first time. Quoting from the Oxford dictionary the definition of "accident" was: "Anything that "happens without foresight or expectation; an unusual event, "which proceeds from some unknown cause, or is an unusual "effect of a known cause." Taken in that sense it appeared to him that the onset of the gale in the present case which was the immediate cause of the curious way in which the *Albion* was lying could fairly be said to be an "accident." See *J. & J. Makin Ld.*

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[3] [1907] P. 170, 174.

v. *London & North Eastern Ry.*[4] It seemed to him that the state of the *Albion* abundantly satisfied the test stated in *The Mendip Range*[5] by Viscount Finlay as the view of the House: "If a "vessel is in such a condition owing to an accident that she can "only get out of the way of another after great and unusual "delay, I think she must be considered as 'not under command' "for the purpose of article 4." The Elder Brethren in the present case, speaking from the point of view of practical seamen, told him (Willmer J.) that they would have regarded the *Albion* as being "not under command." The view expressed by his assessors coincided with the view at which he himself would have arrived with the assistance of the authorities to which he had referred. He thought that the *Albion* ought to have exhibited "not-under-command" lights, and, in his judgment, she was at fault for failure to do so and that fault, undoubtedly, contributed (perhaps indirectly) to the collision.

The faults that he found against the *Albion* were under three headings: (1) in respect of the defective port light; (2) in respect of her failure to exhibit "not-under-command" lights; and (3) in respect of her conduct in putting to sea without taking adequate precautions to ensure the safety both of the vessels comprising the flotilla and also of those she was likely to meet. His conclusion was that the *Albion* was alone to blame for the collision.

On January 28, 1952, Willmer J. held that the collision was caused by the negligence of Swan Hunters and also of France Fenwicks. He gave judgment for the plaintiffs against those defendants, apportioning the blame equally between them. He dismissed the plaintiffs' claim against the Admiralty and McNulty & Son. He gave judgment for the Admiralty against France Fenwicks. He dismissed the counterclaims of the Admiralty against the owners of the *Maystone* and McNulty & Son.

Further facts material to this report appear in the judgment of the Court of Appeal.

K. S. Carpmael Q.C. and *G. N. W. Boyes* for France, Fenwick Tyne and Wear Co. Ld. The *Albion* was in the control of Swan Hunters while she was in their building yard and, by the terms of their contract with the Admiralty, they were to be responsible to the Admiralty all the time, and they remained bailees in

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[4] [1943] 1 K.B. 467; 59 T.L.R. 307; [1943] 1 All E.R. 645.

[5] [1921] 1 A.C. 556, 571; 37 T.L.R. 474.

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possession all the time. The judge found that at the time of the collision with the *Maystone* the *Albion* was in the command of the servant of Swan Hunters. It is not disputed that the *Albion* was the property of the Crown. Questions arise in this appeal on the application of the Regulations for Preventing Collisions at Sea. (See sections 418 and 419 of the Merchant Shipping Act, 1894.) Section 741 of the Act enacts that "This Act shall not, "except where specially provided, apply to ships belonging to "Her Majesty." (See section 742 for the definition of "ship" or "vessel.") [The Collision Regulations, arts. 1, 2, 3, 4, 18, 27, 28 and 29 referred to.] Article 4 reads: "A vessel which "from any accident is not under command shall carry at the "same height as the white light mentioned in article 2 (*a*), "where they can best be seen, and, if a steam vessel, in lieu of "that light, two red lights, in a vertical line one over the other, "not less than six feet apart, and of such a character as to be "visible all round at a distance of at least two miles. . . ."

Article 29 reads: "Nothing in these rules shall exonerate "any vessel, or the owner, or master, or crew thereof, from the "consequences of any neglect to carry lights or signals, or of "any neglect to keep a proper look-out, or of the neglect of any "precaution which may be required by the ordinary practice of "seamen, or by the special circumstances of the case."

The judge held, with regard to the lights, that the *Albion* should have exhibited two red "not-under-command" lights at her masthead as required by article 4 of the Regulations. He found that both Swan Hunters and France Fenwicks were negligent on three points: (1) Failing to get a long range weather forecast; (2) failing to broadcast warnings if the flotilla was in difficulties; and (3) failure to supply sufficient tugs. With regard to (1), there was no evidence that a long range weather forecast was obtainable in October, 1949, nor whether such forecast would have been different from the ordinary forecast which France Fenwicks obtained on the morning of departure, and that was favourable. France Fenwicks should not have been found guilty in that respect. It was Swan Hunters' responsibility; they were the persons who initiated the expedition. It must be proved in evidence that the forecast would have been so unfavourable that the expedition should not have been permitted to put out to sea. With regard to the insufficiency and disposition of the tugs: the evidence was that it would have been dangerous to have made use of a tug astern of the *Albion*. If the *Maystone* had kept a proper look-out there was ample time for her to avoid the collision.

Failure to send out warnings to other shipping: it was the duty of Captain McNulty, who was in command of the *Albion* and was the servant of Swan Hunters, to send out warnings to other ships if there was difficulty in controlling the *Albion*. If any one of the three points fails as against France Fenwicks, the whole of the three-fault negligence found against them fails entirely. The admitted failure to exhibit "not-under-command" signals did not operate against France Fenwicks. That failure was also due to Captain McNulty, who was in command of the *Albion* and was the servant of Swan Hunters. Though the movement of the *Albion* was a joint undertaking by Swan Hunters and France Fenwicks (as found by Willmer J.) that did not make France Fenwicks, quoad Swan Hunters, responsible for such a matter as the defectiveness of the navigation lights. It is true that by the terms of the contract of towage made between France Fenwicks and Swan Hunters it was the duty of France Fenwicks to supply navigation lights, but the lamps passed out of the control of France Fenwicks when they were delivered to Swan Hunters. The ordinary practice where merchant ships are concerned is for the builders to inspect the lights. If one knocks away any one of the legs of the three-fault negligence the whole falls to the ground. The length of steaming in open water of the expedition was 24 hours; the *Albion* was delivered at Rosyth within the time arranged for, namely, two days. The question was whether the *Albion* was in difficulties and, if so, whether it was the duty of those in charge to warn other shipping.

[SOMERVELL L.J. It might be said that it was the duty of those in charge of the tugs who were in the better position to judge.]

The tugs were not in difficulties and they had no right to send out such messages. The owners of the *Maystone* have not shown any negligence against France Fenwicks and are not in a position to do so. The appeal of France Fenwicks should succeed.

Roland Adams Q.C. and *Waldo Porges Q.C.* for the Admiralty. It is submitted that the Admiralty is entitled to recover the whole of the Admiralty damages from France Fenwicks, but France Fenwicks, having been held only equally liable with Swan Hunters, whom the Admiralty under their contract with Swan Hunters have agreed to indemnify, the Admiralty can recover from France Fenwicks no more than half their damages. The Admiralty appeal, therefore, in this court is against the decision of Willmer J. in his judgment of December 20, 1951, holding the *Maystone* free from blame. With regard to the admitted failure of those in charge of the *Albion* to exhibit two red masthead lights to indicate that she was not-under-command as required by article 4 of the Collision Regulations, two questions arose for the court to determine: (1) Was it wrong not to exhibit those signals? (2) Did the failure to exhibit those lights contribute to the collision? It is submitted that the towing lights on the tugs themselves indicated that there was some vessel attached which was encumbent, and to that extent served to warn other vessels as would the "not-under-command" lights. The absence of the "not-under-command" signal can only contribute to the collision if the collision was caused by their absence. It is submitted that the absence of the signal did not so contribute. If the *Albion* was so much athwart the course of the tugs the *Maystone* would or should have seen the white stern light of the *Albion* and if she did not that ought to have put her on guard. The *Maystone* was to blame for the collision.

[SOMERVELL L.J. You have to make out an affirmative case against the *Maystone*.]

One has to consider the probabilities, and here the probability was that the *Maystone* close-shaved the *Albion*.

H. I. Nelson Q.C. and *Derek H. Hene* for Swan Hunters and Wigham Richardson Ld. I adopt the argument of Mr. Carpmael and of Mr. Adams so far as their submissions were directed to the blame attributable to the navigation of the *Maystone*, but I must also make submissions on the negligence of the *Albion*. The onus of establishing the insufficiency of tugs, the failure to obtain a long range weather forecast, and to broadcast warnings was clearly on the owners of the *Maystone*. On the evidence and on the finding of the judge it is common practice to tow with the tow lying athwart the course of the tugs at times. It is not the duty of the tugs to tow otherwise; indeed, it is unavoidable. It must be established that any insufficiency of tugs caused the collision. If the duty to hold the tow behind the tugs did not arise there was no duty to broadcast warnings of difficulties being met with by the flotilla. The duty lies on the plaintiffs to prove that Swan Hunters were under an obligation to exhibit "not-under-command" lights. [*The Matfen*, The Times, May 23, 1913, referred to.] From the time the *Albion* left the Tyne, Swan Hunters owed a duty to other shipping. That duty was to take reasonable care, and they discharged their duty by handing it over to competent contractors. The judge rightly held that Swan Hunters owed no statutory duty to anyone. Had there been a statutory duty different considerations would apply.

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The view he took that Swan Hunters could not discharge their duty by employing a contractor was wrong. [Counsel referred to *Haseldine* v. *Daw & Son Ld.*[6]; *Honeywill & Stein Ld.* v. *Larkin Brothers Ld.*[7]; *The Utopia*[8]; *The Snark.*[9]]

J. V. Naisby Q.C., *J. B. Hewson* and *Gerald Darling* for the owners of the *Maystone*. Both Captain McNulty and Swan Hunters were responsible for the *Albion* putting to sea with a defective port light. Those whose servant Captain McNulty was are also responsible.

[SOMERVELL L.J. France Fenwicks contracted to supply the navigation lights and they could not rid themselves of their responsibility for the lights supplied by them by merely saying that the Ministry of Shipping was satisfied with the vessel and that that was "good enough for them."]

There can be no question that the *Albion* was a "ship" within the meaning of the Merchant Shipping Act, 1898. Any structure that is going to be a ship and is sufficiently advanced to be able to go to sea must come within the rules concerning navigation lights. It is submitted that Swan Hunters were in the position of owners of the *Albion* quoad the owners themselves (the Admiralty). In the court below and in this court it has never been suggested that this vessel which was not registered was not under the obligation to exhibit a red light in accordance with the Regulations.

With regard to the "not-under-command" lights. They are all-round lights without screens. The judge found that this vessel was not under command. Article 4 of the Collision Regulations does not prohibit a vessel from exhibiting not-under-command signals but enjoins that they must be exhibited in certain circumstances. It is submitted that the words in article 4, "from any "accident," do not limit or excuse a vessel for not exhibiting the not-under-command signal where the circumstances require it.

If a vessel is liable to become out-of-command when taken to sea without the occurrence of any accident, then she should not be allowed to proceed to sea at all.

If the regulations apply without the application of article 4, then I rely on article 29, which renders a vessel liable for the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

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[6] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[7] [1934] 1 K.B. 191; 50 T.L.R. 56.

[8] [1893] A.C. 492; 9 T.L.R. 542.

[9] [1900] P. 105; 16 T.L.R. 160.

The test is that laid down by Lord Finlay in *Owners of s.s. Mendip Range* v. *Radcliffe*,[10] who said[11]: "If a vessel is in such "a condition owing to an accident that she can only get out of "the way of another after great and unusual delay, I think she "must be considered as 'not-under-command' for the purpose "of article 4."

When the *Albion* was towed down the Tyne she exhibited "not-under-command" signals. She was then in tow of two tugs ahead and two astern. She was then in a narrow waterway. The *Albion* was in such a condition that she should have exhibited the not-under-command lights, and their absence contributed to this collision. The appeals against the *Maystone* ought to be dismissed.

Cur. adv. vult.

March 13. The judgment of the court was read by HODSON L.J., who, after stating the preliminary facts and reviewing the evidence relating to the causes of the collision, continued: Having considered the judgments and the arguments addressed to us, we are of opinion that the judge's finding that the collision occurred at right-angles while the *Maystone* was running on her course and the *Albion* had got athwart her course, ought not to be disturbed. The only variation in that finding which it appears to us legitimate to make is, by taking the estimate of 1,000 ft. as being nothing more than an approximation, to substitute a distance of about 700 ft. as being the more probable distance separating the *Maystone* from the *Hendon* when they passed abeam of each other. The distance of itself would, as we have said, not be close enough to put the *Maystone* in the wrong. This disposes of the main allegation against the *Maystone*.

The next question is, why did the *Maystone* not see the *Albion*? Apart from the question of lights, in view of the darkness of the night, we find no evidence of negligence on the part of the *Maystone* in not seeing the loom of the *Albion* in time to avoid a collision. If the *Albion* were lying athwart the course of the *Maystone* the port light of the *Albion* would be shut out from those on board the *Maystone* and the latter would not have come into the arc of the stern light from the time the *Maystone* passed the *Hendon* until the collision occurred. The distance of 500 ft. between the side lights and the stern light would make a dark lane through which the *Maystone* was approaching during this part of her run; moreover, before she entered the dark lane the *Maystone* would be on the extreme limit of the arc of the side light. If, however, the port light were strong enough to be visible at the regulation distance of two miles, the light should have been clearly visible long before she was in danger of collision. Much controversy has raged round the side lights of the *Albion*. Before dealing with this it is right to mention that this case has been pleaded as if the Regulations for Preventing Collisions at Sea applied. The position is that since the *Albion* belonged to the Crown the Collision Regulations did not apply to her (see Merchant Shipping Act, 1894, s. 741), and in her then state, not being commissioned, the Queen's Regulations did not apply. The Collision Regulations should, however, we think, be taken to contain not statutory duties applicable in her case, but a standard of care to which those in charge of her should have conformed.

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[10] [1921] 1 A.C. 556.

[11] Ibid. 571.

We do not think that it is necessary to describe in detail the evidence as to the port light. Suffice it to say that it was a converted oil lamp; in place of the wick a fitting for an electric light bulb was placed over the oil reservoir, and into the fitting was placed a two-volt one-watt bulb, in appearance a very small bulb for the size of the lamp. Experiments were conducted on both sides. On the plaintiffs' side a lamp was used which was a copy of the original lamp. The vice of the lamp, according to their expert, was that the bulb did not illuminate the whole of the lens and the light diminished to a pin-point at 700 yards. If observations were taken through the outer part of the lens nearer the limit than the centre of the arc the light disappeared much more quickly. The defendants conducted experiments with the original lamp, but even if they fitted up the lamp in as nearly as possible the same way as it had been at the time of the collision, their experiments did not show the extent to which the outer part of the lens was illuminated since their experiments were conducted from dead ahead. We should mention that the judge accepted the evidence that the red light was, in fact, burning in the port screen of the *Albion*, but rejected, as he was entitled to, having seen the witness, the evidence of the chief officer of a passing ship who claimed to have seen the port light of the *Albion* at several miles' distance on the night of the collision. The judge found, and we see no reason to disturb his finding, that the port light of the *Albion* was defective. Since this light was, to all intents and purposes, invisible to the approaching *Maystone*, we agree with the judge that the defective port light was a contributory cause of the collision. The very high level at which the light was carried, over 50 ft. above sea level, would, if it had been visible, have indicated to an approaching vessel that the tow was of very large dimensions and should have given warning to give a wide berth to such a ship, or whatever the towed object was.

The question of illumination does not rest there. The *Albion* carried oil lamps for use as "not-under-command" lights, if necessary. These were not used. It is said that article 4 of the regulations is inapplicable as a standard of care because if the *Albion* was "not-under-command" it was not through any accident. Article 4 provides: "A vessel which from any accident is "not under command shall carry at the same height as the white "light mentioned in article 2 (*a*), where they can best be seen, "and, if a steam vessel, in lieu of that light, two red lights, in a "vertical line one over the other, not less than 6 ft. apart, and "of such a character as to be visible all round the horizon at a "distance of at least two miles." The judge found that this article was applicable in that the onset of the gale was an accident. We feel a difficulty about this. We are disposed to accept the view that the circumstances in which the *Albion* came to be towing in the way she did could not properly be described as due to an accident. She was without motive power or steering capacity, and the natural consequence of the wind was to cause her to tow in a manner which caused her to extend her length far off the course of the tugs instead of following behind them in the way approaching shipping might expect her to do. There was no moment of time in which it could be said that she suffered an accident.

Was she under command? It is said that since she was being towed and the tugs were under command, she must be treated as one unit with them and under command. Reliance was placed on *The Matfen*, a decision of Bargrave Deane J., reported in The Times newspaper of May 23, 1913, in which he held that the article did not apply to a steamer in tow which was able to steer and had motive power, since she and the vessel towing her must be considered as one. Although the proposition contended for is generally sound, we do not think that the fact that the tugs which are in command are attached to a vessel in tow is necessarily enough to prevent the tow from herself being out of command.

This was a case of a big unwieldy craft high out of the water, incapable of steering, making big yaws and exceptionally subject to the force of the wind. The towing lights would give warning of a long tow which would not necessarily be following her tugs in a straight course; but would not be sufficient warning of an object behaving in the dangerous manner in which the *Albion* was behaving. Accordingly, she appears to come within the principle enunciated by Lord Finlay in *The Mendip Range*[1]: " If a vessel is in such a condition owing to an accident that she " can only get out of the way of another after great and unusual " delay, I think she must be considered as ' not-under-command ' " for the purpose of article 4." This language, apart from the words " owing to an accident " is, we think, applicable here, and our assessors, like the Elder Brethren in the court below, entertain no doubt but that as seamen they would have regarded the *Albion* as " not-under-command " and have ordered the exhibition of the appropriate lights.

Since article 4 is not applicable where there has been no accident, the lights would be exhibited by taking article 29 of the regulations as indicating the standard of care: " Nothing in these " rules shall exonerate any vessel, or the owner, or master, or " crew thereof, from the consequences of any neglect to carry " lights or signals, or of any neglect to keep a proper look-out, " or of the neglect of any precaution which may be required by " the ordinary practice of seamen, or by the special circumstances " of the case." The language of this rule is, we think, wide enough to cover such a situation as this notwithstanding the language of section 419 (1) of the Merchant Shipping Act, 1894, which reads: " All owners and masters of ships shall obey the " collision regulations, and shall not carry or exhibit any other " lights, or use any other fog signals, than such as are required " by those regulations." This obviously does not mean that no lights other than navigation lights can be displayed on the deck or be visible through the portholes of a ship. It would be a very odd construction if such lights could be displayed, for example, for purposes of amusement but not for purposes of safety. The proper construction, we think, is that for the purposes covered by the regulations the lights as prescribed must be used and no others. On this view, it does not prohibit lights required for safety by reason of the application of the general provisions of article 29. We are not seeking to lay down, however, that the application of article 29 necessitated the exhibition of " not-under-" command " lights as such. Any practicable form of deck illumination visible to oncoming traffic would have satisfied the article. We would, accordingly, respectfully disagree with the judge in rejecting the contention of the plaintiffs that such a step should have been taken in the special circumstances notwithstanding the language of section 419 of the Merchant Shipping Act, 1894.

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[1] [1921] A.C. 556, 571.

As this is a matter of seamanship we have sought advice on this matter, and our assessors advise that if deck illumination were practicable this should have been used. Failure to carry "not-under-command" lights or other form of illumination to warn approaching shipping was, in our view, a contributory cause of the collision.

The last heading under which there has been a finding of blame against those responsible for the expedition undertaken by the *Albion* (whoever they may be) is that of defective planning. This may be summarized as follows: the tugs were insufficient in number or wrongly disposed, no long-range weather forecast was obtained, and no wireless warning signals were given for the benefit of other shipping. These three points were taken together, but can be discussed separately. The judge held that, at any rate, in the absence of the other two precautions mentioned, a stern tug should have been employed, and in that matter he relied on the advice of the Elder Brethren and rejected the evidence given by Captain Stewart, the senior tugmaster, that a stern tug would have been ineffective and would have been in danger of being swamped. We feel some difficulty in supporting the judge's finding on this aspect of the case, because the evidence of Captain Stewart was never effectively challenged and the Elder Brethren did not profess to be experts in this particular matter. Moreover, our assessors are divided in their opinion, one thinking that a stern tug might have helped to prevent the *Albion* from lying athwart the course, and the other taking the view that it would be futile. On the whole, we are of opinion that this particular point made against the planners of the expedition fails, in that there was not sufficient evidence that a stern tug would have performed any useful service in the prevailing conditions. There is, however, force in the judge's finding that in the circumstances there was a want of care in putting to sea at all. Apart altogether from any long-range weather forecast which could have been obtained (as to this, there is no evidence as to what such forecast would have foretold), the barometers at St. Mary's, Coquet and Longstone lighthouses had been falling steadily during the

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days immediately preceding the expedition, and accordingly the planners cannot be absolved from a charge of lack of prudence in putting to sea in these conditions. The advice which we have received supports this view. Further, having put to sea and finding the tow behaving in the manner described, it would have been quite possible for the tugs, which were equipped with wireless, to broadcast warnings to other shipping using the track followed by the flotilla.

Summarizing, therefore, the findings against the *Albion* which should be taken to have contributed to the collision, they are: (1) defective port light; (2) failure to exhibit "not-under-"command" lights or other illumination to warn oncoming shipping; (3) defective planning in sailing in the conditions shown by the falling barometer and, having sailed, in not broadcasting warnings to other shipping. We agree with the judge that nothing that happened after the collision affects the findings above enumerated. No allegation of negligence against either the *Maystone* or the *Albion* during the period between the collision and the sinking of the *Maystone* was substantiated.

It is now necessary to consider the apportionment of blame. The contest here has been between Swan Hunters and France Fenwicks, each of whom has been held equally liable to the plaintiffs. This result was arrived at by dividing the causative effects of the faults found in the following proportions: (a) three-eighths to defective port light, (b) three-eighths to defective planning and (c) one-quarter to failure to exhibit "not-under "command" lights. As to (a) and (b) France Fenwicks were found two-thirds and Swan Hunters one-third to blame. As to (c) Swan Hunters were found entirely to blame. Accordingly, the liability was divided equally between these two defendants. Swan Hunters have contended that not they but France Fenwicks were in possession and control of the *Albion* at the material time, so that Captain McNulty was not their servant but the servant of France Fenwicks. The position of Swan Hunters under their contract with the Admiralty is fully set out in the judgment below. Although the vessel was the absolute property of the Admiralty, even in her incomplete state, by clause 43 of the contract Swan Hunters were responsible for her care and efficient protection until she was taken over by the Admiralty.

The question is, broadly, whether they handed over all their responsibilities to France Fenwicks having regard to the terms of their contract with the Admiralty. The correspondence, we think, bears out the contention of France Fenwicks that Swan Hunters never had any intention of parting with the possession of the *Albion.* [His Lordship read the correspondence and continued:] On October 10 a meeting was held between Swan Hunters and France Fenwicks at Swan Hunters' office (the Admiralty overseer was also present at the meeting) and final arrangements were discussed between all parties. The effect of the correspondence up to and including August 3, 1949, and of the subsequent arrangements between the parties is to show clearly to our minds that the normal relationship of tug and tow was to prevail throughout. Swan Hunters remained in control and never transferred possession to France Fenwicks. Their control continued through their servant, Captain McNulty, who was engaged by France Fenwicks on their behalf, although he was not engaged or paid by them but by France Fenwicks who had engaged him at the request of Swan Hunters. The control remained with Swan Hunters, who were continuously insisting that the whole operation of moving the ship from the Tyne to Rosyth should be under the control of the captain of the ship, namely, Captain McNulty. On our reading of the correspondence, the position was analogous to that of a ship's crew engaged by an agent for the owners, and the test of control applied in *Mersey Docks & Harbour Board* v. *Coggins*,[2] is satisfied so as to make Swan Hunters the employers of Captain McNulty. If it be said that Captain McNulty had no say in the matter and that his services could not be obtained without his consent, it is to be noticed that he himself opened articles for the voyage in the name of Swan Hunters as owners, as if he regarded himself as employed by them. The work of preparing the *Albion* for the voyage proceeded under the general supervision of Captain McNulty acting, in our judgment, as servant of Swan Hunters.

Electric lamps for the side and stern lights were put on board on October 10 by France Fenwicks since by the contract they had agreed to provide navigation lights. The screens were constructed by Swan Hunters and fitted in positions approved by Captain McNulty. Later the lamps were tested by France Fenwicks to the extent that they ensured that the lights came on when the lamps were connected with the batteries. No one took any steps to have the lamps inspected by a Ministry of Transport surveyor and no such inspection took place. In these circumstances, Swan Hunters sent the *Albion* to sea with a light which was defective and, on the facts of this case, we do not think that they can escape liability by saying that their duty in relation to the navigation lights was a duty to exercise reasonable care and that this duty has been discharged by the employment of competent contractors. It seems to us to be impossible for Swan Hunters to maintain that this action on their part can be sufficient to satisfy the limits of the duty imposed on them, since the lamps supplied were quite obviously not normal ships' lamps. It was plain at a glance that they were oil lamps converted to electricity, and opening the lamps would at once reveal the minute bulbs fitted therein,

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[2] [1947] A.C. 1.

We do not think that anything can be made of the point put forward on behalf of Swan Hunters that France Fenwicks rather than they themselves were experts in navigation lights on whose skill they were entitled to rely. Swan Hunters were in as good a position as France Fenwicks to see that the lights were efficient, particularly having regard to the fact that Captain McNulty as their servant put to sea without any test of the lamps for their efficiency as opposed to their capacity to light when switched on. We would, therefore, not absolve Swan Hunters from blame in respect of the defective port light.

France Fenwicks cannot, however, escape from blame themselves since, having provided the defective light, they towed the Albion to sea equipped with that light which, as the judge found, brings them into a relationship of proximity with other vessels which might be encountered at sea. The fault in planning consisting, as we think it did, in risking the expedition on the known barometric readings and in failure to warn other shipping by wireless after trouble arose, must, we think, be divided between Swan Hunters as being in possession of the ship and France Fenwicks, who took part with them in planning the expedition. The failure to exhibit "not-under-command" or other lights to warn shipping of the dangerous way in which the *Albion* was behaving at the time immediately preceding the collision was the fault of Swan Hunters acting through their servant Captain McNulty. The failure to exhibit "not-under-command" lights or to illuminate the deck was, we should have thought, the main contributory cause of the collision. Even if the port light had been effective the *Maystone* might not have realized that the *Albion's* stern could be where it was. The wireless messages might not have reached her, but "not-under-command" lights or the lighting of the deck would have disclosed what lay ahead, and we would therefore have given the causative effect of the failure

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to exhibit "not-under-command" lights or other lights a higher fractional proportion than did the judge.

Taking all these facts together and bearing in mind, so far as planning was concerned, that the control was in the hands of Swan Hunters according to the terms of their contract with France Fenwicks, we would apportion the blame as two-thirds to Swan Hunters and one-third to France Fenwicks.

JENKINS L.J. That means that France Fenwicks' appeal succeeds as against Swan Hunters to the extent that the apportionment of liability is altered from half-and-half to one-third France Fenwicks and two-thirds Swan Hunters. Otherwise no alteration is made in any of the findings of the judge.

Appeals against the Maystone dismissed.
Appeal against the Admiralty dismissed.
Appeal by France Fenwicks allowed only as to the apportionment.

Solicitors: *Holman, Fenwick & Willan*; *Treasury Solicitor*; *Bentleys, Stokes & Lowless for William Mark Pybus & Sons, Newcastle-upon-Tyne*; *Middleton, Lewis & Co. for Middleton & Co., Sunderland.*

H. G.

SEALEY (ORSE. CALLAN) *v.* CALLAN.

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Mar. 5, 20.

Davies J.

Husband and Wife—Divorce—Conflict of jurisdiction—Wife's petition in England—Husband's divorce proceedings abroad in court of domicile—Application to stay English proceedings—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 1, 4, 18 (1) (*b*)—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 41.

When the court has beyond question jurisdiction in a matter, it requires a very strong case before it will exercise its power to prevent a party from proceeding, whether it be with an action at common law or a petition for divorce, on the ground that the defendant or the respondent either previously or subsequently has begun a cross-action or cross-petition in a foreign jurisdiction. The courts of this country ought not to stay a petition here on the ground that a petitioner happens to be a respondent elsewhere.

The general words in sections 1 and 4 of the Matrimonial Causes Act, 1950, do not entrench upon the inherent power of the court to govern its own proceedings.

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A wife resident in England filed a petition in the High Court for divorce, relying, in so far as jurisdiction was concerned, upon the provisions of section 18 (1) (*b*) of the Matrimonial Causes Act, 1950. The husband, who was resident and domiciled within the jurisdiction of the South African courts, entered an appearance to the petition under protest, and after doing so commenced proceedings for divorce in those courts. Each party alleged desertion by the other in 1944; the husband also alleged adultery, and there was evidence of a bigamous marriage by the wife in 1946 and the birth to her of a child of that union. Upon an application by the husband to stay the English proceedings until the trial and determination of his action for divorce:—

Held, that in view of the circumstances of the case, of the undoubted possibility that the wife might be able to derive advantages from exercising her right to proceed in this country, and in view also of the evidence of delay by the husband in instituting his proceedings, the husband had failed to satisfy the court that he had made out his case for a stay, and his application must be dismissed.

SUMMONS (adjourned into court).

The parties were married in India in 1941, and finally separated in 1944. On November 28, 1952, the wife filed a petition in the High Court by which she prayed for a decree of divorce, in the exercise of the court's discretion, on the ground that she had been deserted in 1944. She relied upon section 18 (1) (*b*)[1] of the Matrimonial Causes Act, 1950, as giving the court jurisdiction to hear her petition. The husband instituted divorce proceedings in the Supreme Court of South Africa in March, 1953, on the ground of the wife's adultery. Those proceedings are referred to below.

In an affidavit filed in connexion with this summons the husband stated that he had been born in Scotland in 1906 but in 1937 had acquired, and retained, a domicile of choice in the province of Natal, South Africa. He further alleged that in 1946 the wife, whom he had not seen since 1944, had gone through two forms of marriage (one a civil and one a religious ceremony) with a man called Sealey, and that she had given birth to a child in December, 1946, as a result of that bigamous union. (The wife had admitted the birth of that child in her petition; in her affidavit she stated that her marriage to Callan had been declared null and void by the Roman Catholic church before the religious ceremony with Sealey, which she admitted, although the validity of her marriage to Callan was not in dispute in the present proceedings.)

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[1] Matrimonial Causes Act, 1950, s. 18 (1): "Without prejudice to any "jurisdiction exercisable by the court "apart from this section, the court "shall by virtue of this section have "jurisdiction to entertain proceedings "by a wife in any of the following "cases, notwithstanding that the "husband is not domiciled in "England . . . (*b*) in the case of "proceedings for divorce or nullity "of marriage, if the wife is resident "in England and has been ordinarily "resident there for a period of three "years immediately preceding the "commencement of the proceedings, "and the husband is not domiciled "in any other part of the United "Kingdom or in the Channel Islands "or the Isle of Man."

On January 19, 1953, an appearance was entered to the petition by solicitors on behalf of the husband in these terms: "Enter conditional appearance for Joseph Caird Callan the "respondent in this cause under protest that this Honourable "Court has no jurisdiction in this suit"; and on January 30, 1953, the respondent, through his solicitors, took out a summons under rule 14 (2) of the Matrimonial Causes Rules for directions as to the determination of the question arising by reason of such appearance. That summons came on before Mr. Registrar Townley Millers on February 19, 1953, who ordered: ". . . that the "respondent's application under and by virtue of rule 14 (2) of "the Matrimonial Causes Rules, 1950, for directions as to the "determination of the question of jurisdiction arising by reason "of the respondent's appearance under protest herein be, and the "said application hereby is, dismissed. And it is further ordered "that the respondent be at liberty to amend his appearance to "a general appearance within seven days after the date of this "order."

Notice of appeal was given, and the matter came before Davies J. in chambers on March 5, 1953. The husband was represented by counsel, who at once conceded that the appearance under protest had been completely misconceived, as had been the application for directions, and asked the court to consider the appeal as an application for a stay of the wife's petition. Leave was given for the summons to be amended, and after argument the matter was adjourned for further argument and consideration in open court. The amended summons which was handed in at the hearing in open court was ". . . to shew cause "why an order should not be made that all further pro-"ceedings in this suit should be stayed pending the trial and "determination of the action for divorce instituted by the [hus-"band] against the [wife] in the Supreme Court of South Africa "and that either party be at liberty to apply in the event of the "said action in the Supreme Court of South Africa not being "proceeded with with due expedition or at any time after the "conclusion of such action." The wife by her counsel did not object to the amendment but asked for protection as to costs.

There had been evidence before the court on March 5, 1953, that the husband was instituting proceedings for divorce in the Supreme Court of South Africa on the ground of the wife's adultery with Sealey, and that on March 9, 1953, his application would be heard in that court for leave to sue the wife by "edictal "citation." It was stated that such an application corresponded to an application to the High Court in England for leave to issue a writ against, and serve notice of it, on a person resident outside the jurisdiction, except that such an application was necessary even where the cause was a matrimonial cause. If leave were given to sue by "edictal citation," the citation itself corresponded to notice of a writ issued in the High Court and would have to be served personally on the wife as defendant. It was stated on behalf of the husband that that application could not be heard until the long vacation, which had begun on December 18, 1952, ended on March 2, 1953. Evidence was put in at the adjourned hearing of the present summons (March 20, 1953), that leave had in fact been given on March 9, 1953, to issue proceedings in South Africa, and that the "edictal citation" had been issued on March 13, 1953, and served on the wife on March 19, 1953. The husband in those proceedings alleged adultery as a ground for divorce.

There was further evidence on affidavit on behalf of the husband that in July, 1952, he had instructed certain English solicitors to make inquiries on his behalf, but that he had been unable to obtain any evidence. It was stated that on October 10, 1952, his English solicitors had told the wife's solicitors that he would be taking proceedings for divorce if he could obtain the necessary proof of adultery, and that his present solicitors were instructed in December, 1952, but did not get the birth certificate of the child alleged to be the offspring of the adulterous and bigamous union until February 20, 1953. It was also stated that Sealey had obtained in this court a decree of nullity in the English Divorce Court on the ground of bigamy, that that decree had been made absolute on August 8, 1952, and that a letter had been written to Sealey, who was serving with the army in Korea, as soon as his address had been traced, but that no reply had been received.

In an affidavit filed on behalf of the wife there was exhibited a letter written on May 19, 1950, to her solicitors in the present proceedings by Messrs. Offenbach & Co., the solicitors who had been acting for Sealey, in the following terms: "We are in communication with our client, the above Mr. Sealey, in relation to "various proceedings he proposes to take. On making inquiry we "have received information which appears to show that our client "and your client although having gone through a ceremony of "marriage are not married owing to your client contracting a "previous marriage in the Roman Catholic Church in Lower "Circular Road, Calcutta, on or about April 21, 1941, with Jack "Callan, and owing to the fact that when your client went "through the ceremony of marriage with Mr. Sealey Mr. Callan "was alive, the previous marriage therefore subsisted. We have "obtained this information from Mr. Callan himself by letter "dated May 2, 1950. In order to remove any doubt about the "matter our client nevertheless desires to bring an action for a "declaration and we shall be obliged if you will first of all let us "know your client's present name and address so that she can "be served with these proceedings when they are ready and if "you could by any chance let us have a copy of the marriage "certificate we should be obliged."

From expert evidence filed on behalf of the husband it appeared that a divorce might be obtained in the courts in Natal on the ground of desertion for 18 months as well as adultery. There was also expert evidence filed on his behalf that any decree granted by the English court in the exercise of its jurisdiction under section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, would not be recognized in the South African courts, where the sole test of jurisdiction was domicile except for the jurisdiction given by the Matrimonial Causes (War Marriages) Act, 1944, and similar legislation.

It appeared from other evidence that there was one essential difference between the powers of the Supreme Court of South Africa, in the exercise of its jurisdiction in divorce, and those of the English court, namely, that the South African court had no power to grant maintenance to a wife save by consent.

D. Tolstoy for the husband.
H. J. I. Summerfield for the wife.

Argument was begun in chambers and continued in open court.

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Cases cited in argument are included in the judgment except for the following: *Higgs* v. *Higgs*,[2] *Kemp-Welch* v. *Kemp-Welch and Crymes*,[3] *Sanders* v. *Sanders*,[4] *Cooper* v. *Cooper*.[5]

The nature of the submissions are fully summarized in the judgment.

DAVIES J. considered the circumstances in which the present application was made, and said that both counsel had argued the matter fully and extremely ably. He summarized the effect of the argument on behalf of the husband as follows:—"I (the husband) am domiciled in South Africa. Therefore you, "the wife, are domiciled in South Africa as well. Therefore, by "the law of England and by the law of most countries that we "know about, including most importantly South Africa, the "proper court to decree a dissolution of this marriage, if it is to "be dissolved, is the South African court." [His Lordship continued:] There is now, though there was not at the date of the earlier hearing of the summons, a petition on foot in the Supreme Court of South Africa for the dissolution of this marriage. Therefore, says Mr. Tolstoy, the most convenient court to dispose of this dispute between these spouses is the South African court and not the English court. That is putting it rather shortly, and I shall elaborate it; but that is the effect of this application.

[His Lordship referred to the matters set forth in the affidavits and continued:] Mr. Tolstoy has put before me a number of powerful considerations in support of his application for a stay. His first submission is that any decree obtained by the wife in this court would only be valid here and would not be valid in South Africa. On the evidence that appears to be right. He says, secondly, that if the husband cares to come here to take part in the proceedings in this court, he can only defend himself and cannot counter-attack; that is to say, if his case is accepted, he can succeed in defeating the wife's petition for dissolution of marriage, but he cannot himself in this court obtain a decree of dissolution. It is not necessary, I think, for me to decide that interesting question arising under section 18 (1) (*b*) of the Matrimonial Causes Act, 1950. It is an interesting proposition and it may very well be sound, but it is not necessary for me to express an opinion about it. Thirdly, it is contended that, whatever happens in this court, it would be necessary for the husband to take proceedings in South Africa in order to put an end to the marriage; that is to say, that if contrary to the husband's contention the wife is right on the merits and entitled to obtain and were to obtain a decree here, the husband, since that decree would be invalid in South Africa, would have to take separate proceedings in the South African court in order to obtain a decree which would be valid in South Africa or anywhere but in England and would enable him to marry again, though there is no suggestion at the moment that he does wish to re-marry.

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[2] [1935] P. 28; 51 T.L.R. 22.

[3] [1910] P. 233; 26 T.L.R. 464.

[4] [1911] P. 101.

[5] [1953] P. 26; [1952] 2 All E.R. 857.

It was further submitted that it was undesirable and contrary to public policy to have these two suits proceeding simultaneously, because there might be what was called a race between the parties to expedite the hearing and the determination of the respective suits. For, as was pointed out, upon the authority of *Boettcher* v. *Boettcher*[1] (and I think rightly), if in fact the South African case were to come on first and a decree were to be pronounced therein, this court would not proceed any further under section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, if a competent court had already dissolved the marriage. Counsel has referred me to a number of well-known cases in support of his contention that, by the law of this country, as of many countries, the court of the domicile of the parties is the proper and competent court to dissolve a marriage, and that it is undesirable from every point of view to have different courts pronouncing on these matters of status with the result that a party might be married in one country and not married in another.

In *Le Mesurier* v. *Le Mesurier*[2] Lord Watson, in delivering the opinion of the Judicial Committee, cited with complete approval[3] the views which had been expressed by Lord Penzance in *Wilson* v. *Wilson*[4]: " ' It is the strong inclination of my own " ' opinion that the only fair and satisfactory rule to adopt on " ' this matter of jurisdiction is to insist upon the parties in all " ' cases referring their matrimonial differences to the courts of " ' the country in which they are domiciled. Different com- " ' munities have different views and laws respecting matrimonial " ' obligations, and a different estimate of the causes which " ' should justify divorce. It is both just and reasonable, " ' therefore, that the differences of married people should be

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[1] [1949] W.N. 83.

[2] [1895] A.C. 517; 11 T.L.R. 481.

[3] [1895] A.C. 517, 540.

[4] (1872) L.R. 2 P. & M. 435, 442.

" 'adjusted in accordance with the laws of the community to " 'which they belong, and dealt with by the tribunals which " 'alone can administer those laws. An honest adherence to " 'this principle, moreover, will preclude the scandal which " 'arises when a man and woman are held to be man and wife " 'in one country and strangers in another.' " Two other cases which were cited, *Lord Advocate* v. *Jaffrey*,[5] and in particular the passage at p. 152, and *Salvesen* v. *Administrator of Austrian Property*,[6] are to the same effect. Mr. Tolstoy does not argue on the strength of those cases, and he could not argue, that this court has no jurisdiction to entertain the wife's petition. What he contends is that in deciding whether or not in my discretion (in so far as it is a matter of discretion) to allow this wife's suit to proceed under the special jurisdiction provided by section 18 of the Matrimonial Causes Act, 1950, I ought to have regard to the desirability from the public point of view, the international point of view, and the general principle consistently followed by our courts, as well as by the courts of other countries, of regarding the court of domicile as the proper court, and therefore, other things being equal, of preferring it to any other special jurisdiction.

Reference was also made (and it is an attractive point) to the provisions of rule 4 (1) (*f*) (ii) of the Matrimonial Causes Rules, 1950, which provides that in the case of such a petition as the present one the wife in her petition must inter alia state "whether to the knowledge of the petitioner proceedings for "dissolution or nullity of the marriage or judicial separation or "restitution of conjugal rights or for other relief in respect of the "marriage, are pending in any other country and, if so, the nature "of those proceedings." That sub-rule, it was said, suggests that if the court is apprised that there is some other court which is, to use the widest words, dealing with the marriage, and if it finds that that other court is the court of the domicile, there would be at any rate a tendency on the part of the English court not to allow the suit here to proceed, but to stay it until the other court has heard the matter. Finally, the obvious point was taken, that if the two suits are to continue, the very greatest expense and inconvenience will be caused to everyone concerned, and, possibly, more particularly to the husband.

In the light of all those considerations the court is asked to exercise the jurisdiction, which in my opinion it undoubtedly has, to stay these proceedings, not on the ground that this petition is frivolous or vexatious, in the true sense of that word as I understand it, but on the ground that there is a suit proceeding in another court, and that the other court is the convenient court.

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[5] [1921] 1 A.C. 146; 36 T.L.R. 820.

[6] [1927] A.C. 641, 653, 654; 43 T.L.R. 609.

Mr. Summerfield on the other hand first of all submitted, as I understand him, that I have no jurisdiction at all to make the order prayed for. Under section 1 of the Matrimonial Causes Act, 1950, which does not differ in this respect from earlier Acts, a petition for divorce may be presented; section 18, as I have already pointed out, gives the court this special jurisdiction; and when the petition has been presented, it is provided by section 4: "(1) . . . It shall be the duty of the court to inquire . . . into "the facts alleged and . . . (2) If the court is satisfied on the "evidence that (*a*) the case for the petition has been proved" (and I leave out sub-paragraphs (*b*) and (*c*) as being irrelevant to the present consideration) "the court shall pronounce a decree "of divorce. . . ." Mr. Summerfield says that under the Act a spouse has the right to present a petition, and that, if the spouse exercises that right, the court is under a duty to pronounce a decree if the statutory conditions are satisfied, and that it cannot interfere whether by staying the suit or otherwise.

Various authorities on that point have been cited to me this afternoon. Suffice it to say, that in my opinion those general words under the statute do not in any way entrench upon the inherent power of the court to govern its own proceedings, a power which is preserved, of course, by proviso (*a*) to section 41 [7] of the Supreme Court of Judicature (Consolidation) Act, 1925. I say no more about that contention. But it is further argued, and there is in my judgment very much more force in this point, that by the statutory provisions to which I have just referred the petitioner is entitled to bring a suit in this country, and that as there may well be advantages to her in bringing the suit in this country as opposed to defending a suit in South Africa, the court ought not to interfere with her exercise of her right. Indeed the evidence which has been filed this morning, to which I have already referred, suggests one advantage at least, namely that the wife in this jurisdiction may be able to obtain an order for maintenance, whereas in South Africa, as the evidence before me stands, she has no such right.

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[7] Supreme Court of Judicature (Consolidation) Act, 1925, s. 41: "No cause or proceeding at any time "pending in the High Court or the "Court of Appeal shall be restrained "by prohibition or injunction, but "every matter of equity on which an "injunction against the prosecution "of any such cause or proceeding "might formerly have been obtained, "whether unconditionally or on any "terms or conditions, may be relied "on by way of defence thereto: "Provided that—(*a*) Nothing in this "Act shall disable either of the said "courts, if it thinks fit so to do, from "directing a stay of proceedings in "any cause or matter pending before "it."

It is further contended on behalf of the wife that there has been great delay in this case by the husband. The husband was in touch, so I was informed in chambers, with Sealey's solicitors before June, 1952, and the affidavit filed on behalf of the wife to which I have already referred shows that he was in touch with them in May, 1950; and it was stated that an affidavit by the husband was used as evidence in Sealey's nullity petition. Therefore, it is submitted, the husband, if he had been minded to take proceedings in South Africa, had material long ago upon which he could have proceeded on the ground of adultery; and, quite apart from that, if it be the fact that his wife deserted him in 1944, he could have taken steps 18 months thereafter. It is also submitted that it is just as unfair to the wife to ask her to go to South Africa to defend the husband's petition as it may be to the husband to ask him to come here to defend his wife's petition, and that the expense is prohibitive to the wife.

Those are the facts and submissions. What is the law? In opening this case to me Mr. Tolstoy cited three authorities. The first is *Thornton* v. *Thornton*.[8] In that case the petitioner in England was the wife of an officer in the Indian Army. She came back from India to England with his consent, and within two months the husband commenced in the Bombay court a suit for dissolution of marriage on the ground of adultery. The wife was served with the petition in this country and two days later as a counterblast commenced a suit for restitution and managed to serve the husband in this country when he was on leave. There was an application on behalf of the husband to stay the wife's suit until after the determination of the Indian proceedings. It is perhaps not uninteresting to look at the last passage in the argument of Mr. Inderwick, who appeared for the husband,[9] which has at any rate some similarity to the argument of Mr. Tolstoy in the present case: "The wife could "go to India, her husband would have to pay the expenses. . . . "Justice cannot be fully done here, for a divorce cannot be "obtained in the present English suit. It would be oppression "to be obliged to have the issue of adultery tried here and then

[8] (1886) 11 P.D. 176.

[9] Ibid. 179.

" over again in India. The question is one of convenience. In " one case the wife would go to India, having her expenses paid; " in the other, the husband would have to contest the case twice " over." Well, mutatis mutandis there is a great similarity between that argument and the argument for the husband in the present case. Cotton L.J., having first stated the facts, said[10]: " The husband asks that, as his defence to the suit for restitution " of conjugal rights is the adultery of his wife, which is his " ground of action in India, the proceedings in England on the " petition of the wife should be stayed until the question of " adultery has been decided, not only as against her, but as " against the co-respondent in that suit in India. Undoubtedly " there would be certain advantages in taking that course. A " trial in India would be effectual, not only as against the wife, " but as against the co-respondent; the case would be tried in a " place where all the witnesses except the wife are now resident. " And certainly if we could avoid it we should not wish to allow " the husband to be put to the expense of proving the adultery " of the wife in England as well as in India, especially where the " witnesses are in India." I think that his next words are very important and apply with force to the present case: " But what " we have to consider is, whether we can deprive the wife of her " right to have the questions which arise in a suit duly instituted " by her in an English court having jurisdiction over the case, " decided in England, and compel her to have that tried somewhere else. I think that it would not be right for us to do so. " She says: ' There is some evidence by the husband that I made " ' to him a confession of adultery. I deny that in fact I had " ' committed adultery, and I wish to have that question tried. " ' I wish to be able, without going to India, to give in court my " ' explanation of the circumstances relied upon by my husband, " ' and to defend myself by giving evidence that I never have " ' in fact committed adultery.' She wishes (and her wish is not " unnatural, nor do I think it can be said to be unreasonable) to " give her evidence in England rather than go over to India " in order to give it there. I think that, notwithstanding the " inconvenience and expense to which the husband must be put " if both actions are allowed to go on, we ought not to prevent " the wife from going into this question here, nor put her upon " the terms of her action being stayed until the action in India " is decided. The appeal must therefore fail." Bowen L.J.'s judgment is to the same effect, and he says[11]: "I do not say "that we could not do so"—that is, stay the suit—"if we saw "clearly that the ends of justice required it—if we saw clearly "that it would be oppression or waste or vexation for her to "proceed with her suit; but I think we ought not to interfere in "such a way unless it is very clear that we could not do any "harm by the interference, and I do not think the case has been "made clear to us here to that extent." Fry L.J. agreed.

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[10] 11 P.D. 176, 179.

That is a very strong authority for the wife's contention in this case. It is perhaps unnecessary for me to add that there are many authorities for the proposition that the power of the court to stay proceedings in such circumstances is a power that has to be exercised with very great caution.

That was the first case that was cited. It was cited, as indeed was the next one to which I am about to refer, by Mr. Tolstoy in order to distinguish it. He pointed out that that case was a suit for a restitution and that the next case, *Von Eckhardstein* v. *Von Eckhardstein*,[12] was a suit for judicial separation. It was contended that in that respect those cases are to be distinguished from the present one, which is a suit for dissolution, and that whereas the court would be chary of staying proceedings which are derived from the ecclesiastical jurisdiction in order to protect wives, we are here concerned with a question of status which has to be decided as against all the world and that the principle to be applied is therefore quite different. I find it difficult to accept any such distinction as explaining the two cases cited.

Von Eckhardstein v. *Von Eckhardstein* [12] was a case in which a wife had brought a suit for judicial separation on the ground of her husband's cruelty and adultery in this country. Their domicile was German but their residence was in England. After the wife had filed her petition for judicial separation, the husband went to Germany and took proceedings for dissolution on what appear to be somewhat remarkable grounds, namely, that she had disobeyed him in refusing to dismiss her doctor. Bargrave Deane J. dismissed an application by the husband to stay the suit in this court. He said[13]: "It was clear that the wife was "entitled to bring her suit for judicial separation. Why, then, "was it asked, should she be deprived of the right to pursue it? "The answer made was that if she did it was a waste of time

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[11] 11 P.D. 176, 180.

[12] (1907) 23 T.L.R. 539.

[13] Ibid. 541.

" and money, and was, moreover, making quite an unnecessary " scandal if, when it was concluded, the husband succeeded in " obtaining a divorce." That, again, is an example of an application to stay in somewhat similar circumstances, with the difference that that was an attempt to stay not a suit for dissolution but a suit for judicial separation.

The third case on this point which Mr. Tolstoy cited is *St. Pierre* v. *South American Stores (Gath and Chaves) Ld.*[14] The facts do not matter in the least, but the principles upon which the power to stay are exercised are summed up by Scott L.J. as follows [15]: " The true rule about a stay under section 41, so far as " relevant to this case, may I think be stated thus: (1) A mere " balance of convenience is not a sufficient ground for depriving a " plaintiff of the advantages of prosecuting his action in an " English court if it is otherwise properly brought. The right of " access to the King's Court must not be lightly refused. (2) In " order to justify a stay two conditions must be satisfied, one " positive and the other negative: (*a*) the defendant must satisfy " the court that the continuance of the action would work an " injustice because it would be oppressive or vexatious to him or " would be an abuse of the process of the court in some other " way; and (*b*) the stay must not cause an injustice to the " plaintiff. On both the burden of proof is on the defendant."

In re Norton's Settlement, Norton v. *Norton*,[16] in which there are a great many relevant passages of which perhaps I may cite two, might well be added to those authorities. In that case Vaughan Williams L.J. said [17]: " In my opinion it must be proved " to the satisfaction of the court that either the expense or the " difficulties of trial in this country are so great that injustice " will be done—in this sense, that it will be very difficult, or " practically impossible, for the litigant who is applying for the " stay to get justice in this country. Speaking generally, one " may say that the litigant must show that some injustice will " be done to him." I would also quote from the last words of the judgment of Farwell L.J.,[18] where he cites with approval the judgment of Warrington J. in the earlier case of *Egbert* v. *Short* [19]: " ' On the whole the conclusion at which I have " ' arrived is that this action is brought in the tribunal in which " ' it has been brought not bona fide for the purpose of obtaining

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[14] [1936] 1 K.B. 382.

[15] Ibid. 398.

[16] [1908] 1 Ch. 471.

[17] Ibid. 479.

[18] Ibid. 484.

[19] [1907] 2 Ch. 205, 214; 23 T.L.R. 558.

" 'justice, but for the purpose of harassing and annoying the " 'defendant, and of obtaining something to which the plaintiff " 'may not in justice be entitled.' " That is an example of the kind of case where the court would, of course, not hesitate to act.

Cohen v. *Rothfield*[20] was rather the converse of the present case. It is an example of the class of case in which an injunction is sought in this court to restrain a litigant from proceeding in another jurisdiction. "It is obvious, for instance," said Scrutton L.J. in that case,[21] "that an action in South Africa, where "the Dutch procedure prevails, in Mauritius or Quebec, where "French procedure exists, in Malta with its peculiar law, or in "Scotland with its Roman procedure, may produce quite different "results from an English action. It appears to me that unless "the applicant satisfies the court that no advantage can be "gained by the defendant by proceeding with the action in which "he is plaintiff in another part of the King's dominions, the court "should not stop him from proceeding with the only proceedings which he, as plaintiff, can control. The principle has been "repeatedly acted upon." If I may apply that principle the other way round, it seems to me that there is here evidence of at least one advantage to the wife in proceeding in this court, and that it would have to be a much stronger case than the present one to satisfy the court that she is not entitled to seek some legitimate advantage by proceeding here and to justify the making of an order preventing her from going on with the proceedings in this court which she has initiated and which she can control.

The only other authorities to which any reference need be made, I think, are two Admiralty cases, which, of course, are not quite on all fours. But the principle is the same, as I think. The first is the case of *The Janera*,[22] where there had been a collision in the Red Sea and the owners of one ship sued the other ship in the Egyptian court. The defendants in the Egyptian court thereafter commenced an action in the English court against the plaintiff in the Egyptian court, and I will quote one sentence, and one sentence only, from the judgment of Hill J.[23]: "It seems "to me quite clear that the court ought not to stay a plaintiff "in the courts of this country on the ground that he happens to "be a defendant elsewhere." If that principle can be applied to the present case, it would seem that the courts of this country ought not to stay a petitioner here on the ground that she happens to be a respondent elsewhere.

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[20] [1919] 1 K.B. 410.

[21] Ibid. 415.

[22] [1928] P. 55; 44 T.L.R. 193.

[23] [1928] P. 55, 57.

To the same effect is a decision of Langton J. in *The London*,[24] where an Admiralty action was commenced in Scotland in very similar circumstances, and thereafter the defendant in the Scottish court commenced an action in the English court. It is sufficient to read the headnote: "A plaintiff's action "will not be stayed in the courts of this country, as being "prima facie vexatious, merely because the plaintiff is defendant "in an action commenced in Scotland in respect of the same "subject-matter. It is a question for the discretion of the court "on the facts of each case."

In my judgment on the authorities it requires a very strong case to persuade this court to prevent a party from proceeding, whether it be with an action at common law or a petition in this court, when this court has beyond question jurisdiction in the matter, on the ground that the defendant or the respondent in this court has either previously, as in some of the cases, or subsequently, as in the present case, started what for convenience I may call a cross-action or cross-petition in a foreign jurisdiction. In view of all the circumstances in this case, in view of the undoubted possibility that the petitioner may be able to derive advantages from exercising the right which she has to proceed here, in view of the fact to which I cannot shut my eyes that there has at any rate been some delay by the husband in setting the machinery of the law moving in South Africa when he had serious grounds for thinking that he had a cause for complaint against his wife, I am not satisfied that the husband has here made out his case for a stay. I accordingly dismiss the appeal from the decision of the registrar upon the summons in its amended form, with costs here and below.

Appeal dismissed.

Solicitors: *George & George; Thompson, Quarrell & Megaw.*

J. B. G.

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[24] [1931] P. 14; 47 T.L.R. 170.

1953
March 4.

Barnard J.

RIDLEY *v.* RIDLEY.

Husband and Wife—Justices—Maintenance—Wilful neglect to maintain—Neglect in respect of wife but not of child—Jurisdiction to make orders in respect of both—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23.

Where a husband has been proved to have been guilty of a wilful neglect to provide reasonable maintenance for his wife, but has not been proved to have been guilty of such neglect in respect of his children, the court has power under section 23 of the Matrimonial Causes Act, 1950, to make orders for periodical payments in respect both of the wife and of the children.

ORIGINATING SUMMONS under section 23 of the Matrimonial Causes Act, 1950.[1]

The parties were married in 1940, and two children, both girls, were born respectively in 1942 and 1947. At the date of the hearing of the summons, both were at a boarding school and the husband was paying the fees. In October, 1949, the wife instituted proceedings against the husband for restitution of conjugal rights: the husband by his answer alleged that he had just cause for refusing to live with her. The petition was dismissed on the wife's application when the parties became reconciled; but in May, 1952, the husband went for a holiday on his own abroad and after his return wrote to the wife on June 5, 1952, in terms which made it clear that he was never going to return to her. He stated further that he could not afford to continue to pay the rent of the flat where the wife was living and that he had given notice to terminate the tenancy. The husband in fact continued to pay the rent until the wife found other accommodation in August, 1952. He said that he would consider what he could do, within reason, to give the wife a regular allowance.

On July 8, 1952, the husband wrote: " I am able to pay you " £3 a week, tax paid at the standard rate, which is equivalent " to some £300 a year. If you will let me know your address I

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[1] Matrimonial Causes Act, 1950, s. 23 (1): " Where a husband has " been guilty of wilful neglect to pro- " vide reasonable maintenance for his " wife or the infant children of the " marriage, the court, if it would " have jurisdiction to entertain pro- " ceedings by the wife for judicial " separation, may, on the application " of the wife, order the husband to " make to her such periodical pay- " ments as may be just; and the " order may be enforced in the same " manner as an order for alimony in " proceedings for judicial separa- " tion."

"will forward this to you regularly. You will, of course, claim "income tax as you have done formerly."

In November, 1952, Willmer J. adjourned the summons which the wife had then issued, for a report by the registrar upon the means of the parties. The husband in his affidavit maintained that it could not be said that £3 a week for the wife, together with the fact that he was paying the school fees, was unreasonable.

On June 1, 1952, the husband had entered into a deed of covenant, with trustees, to provide a monthly sum of £91 13s. 4d. for the maintenance and education of the two children. It was contended that by reason of that deed the husband could not be said to have been guilty of wilfully neglecting to provide reasonable maintenance for the infant children of the marriage.

John Latey for the wife. Where the court finds that a husband has been guilty of a wilful neglect to provide reasonable maintenance for his wife, even though there is no such finding in regard to the children, the reasonable construction of the wording of section 23 (1) of the Matrimonial Causes Act, 1950, is that the court has power to make orders regulating the financial provision to be paid by the husband for both wife and children.

Colin Duncan for the husband. On the true construction of the section the court's power to make any order in respect of the children arises only if it is found that the husband has been guilty of a wilful neglect to provide reasonable maintenance for them. Applying the principles in *Scott* v. *Scott*,[2] the wife has failed on the facts to establish any wilful neglect to provide reasonable maintenance for her.

BARNARD J. This is a summons under section 23 of the Matrimonial Causes Act, 1950, which has been taken out by Mrs. Ridley against her husband. The question which I have to consider, as I see it, is whether or not the husband has been guilty of wilfully neglecting to provide reasonable maintenance for his wife or his infant children. [His Lordship stated the facts and continued:] It was suggested that the wife was wrong in issuing this summons. I cannot see that she did anything wrong at all; by issuing the summons she never shut the door on negotiations and in issuing that summons she was only properly protecting her own interests.

[2] [1951] P. 245; 66 T.L.R. (Pt. 2) 1077; [1950] 2 All E.R. 1154.

The matter came, in due course, before Willmer J. on November 7, 1952, who adjourned it for a report by the registrar on the means of the parties. I now have that report, dated February 4, 1953, before me. The husband maintains that, on the figures, it cannot be said that the £3 a week, together with the fact that he is paying for the boarding school fees of the two children, is unreasonable. His counsel referred me to a very short passage in the judgment of Hodson J. in *Scott* v. *Scott*[1] in support of his argument: " As I understand it, the question " of what is reasonable maintenance for the wife and children " has to be considered, with reference to the husband's common " law liability to maintain his wife and children, and the word " ' reasonable ' no doubt has to be interpreted against the " background of the standard of life which he previously had " maintained."

I unhesitatingly agree with these remarks of Hodson J. I have come to the conclusion that, even accepting the registrar's report (and we know there are some flaws in that report) at its face value, which would give the husband a spendable income of £1,500 per annum, the husband's offer was not a reasonable one. In those circumstances I have no hesitation in finding the husband guilty of wilfully neglecting to provide reasonable maintenance for his wife.

The only other proposition that was put before me was that I could not find the husband guilty of wilfully neglecting to provide reasonable maintenance for the infant children of the marriage, because he had entered into a deed of covenant, with trustees, on June 1, 1952, to provide a monthly sum of £91 13s. 4d. for the maintenance and education of these two children. I think that this is purely a theoretical point, a theoretical point which is not of any practical value in view of the provisions of section 23 of the Matrimonial Causes Act, 1950. [His Lordship read the section.]

If that section were to be read in a narrow way, limiting what I think is its true meaning, I could always take into account the fact that the wife was going to have the children to stay with her during a portion of the holidays, and add that amount to the sum which the husband should be ordered to pay his wife; but I feel convinced that I have to regard that section broadly, and it is more convenient that there should be a definite order against the husband to provide periodical payments for the wife and further to pay her certain sums while the two children are living with her, for their maintenance. An order in that form is also of advantage to the husband, and is an order which I have no doubt the court has jurisdiction to make under the section; although, if I only had to decide whether he had been guilty of neglecting to provide reasonable maintenance for the children, I should obviously answer that in the negative, because of the deed.

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[1] [1951] P. 245, 248.

The only other matter with which I have to deal is the question of the order itself. I have had statements of accounts put in and I have the affidavits and the registrar's report. Neither counsel has really gone into the figures too thoroughly, and quite properly, because I have had to decide the issue between husband and wife before any question of amount arises, and I think that it would be much more satisfactory if a registrar were to determine exactly what that order should be.

The only thing that I am going to say about it is this, and this I say solely to try to assist the registrar who may conduct this inquiry and make an order. I do not think it would be safe to make an order purely on the basis of the present registrar's report before me. In the third paragraph of the report (it may be that there is some explanation) it would appear that the registrar has made an error, and an error which would be in favour of the wife and against the husband. It seems to me to be pretty clear that when he has dealt with the total gross income of the husband for the year 1952 (and he has put the figure at £3,161), that that really is wrong; the correct figure is £2,611, as appears from the balance sheet. What the registrar seems to have done is that he has refused to allow the husband the full deduction he claimed for a car allowance during that year, and he has put a figure for car allowance which he thinks would be a fair deduction, and then has added that figure to £2,611, and, having done that, has repeated the process in adding it on again, which has brought the husband's gross income to £3,643. I think that that matter should be pointed out to any registrar who has to conduct this inquiry.

Another matter where I think I may assist any registrar who conducts the inquiry is this. The registrar appears to have taken a three years' average. During the first of those three years the husband was only earning somewhere in the neighbourhood of £1,900, but during the two later years, 1951 and 1952, his gross annual income was over £3,000, and, therefore, I think that it would be wrong to take a three years' average. If you come to the conclusion that it is not right to take a three years' average in order to arrive at what is, in all probability, the average income of the husband, and going to be his average income for the immediate future, you ought to act on the last year, and I think that the registrar, in arriving at whatever figure he does arrive at, should work on the last year's income only in this particular case.

The only other matters to which I need call attention are these. Having dealt with his gross income, including certain investments, in arriving at what is the proper figure on which to base the wife's allowance, the registrar has deducted the £1,100 a year which the husband is paying under this deed. I have come to the conclusion that that is entirely wrong. The deed merely provides for the maintenance and education of the two children, and it would be wholly wrong, and against all the principles of this court, to find out what the husband ought to pay in regard to his children first and then deduct that from his income before you begin to arrive at a figure which the wife should have. I do not think it helps the husband as against the wife to have provided for his children by a deed, more particularly when one looks at this deed, which can be terminated at the end of a year, that is by June of this year.

I notice also that the registrar has allowed deductions for premiums on insurance policies. That, again, is not a proper deduction, unless (and I see no evidence of it here) those policies were, for example, pledged to the bank to secure a loan; but where the policies are free and the husband happens to be paying premiums on them, it is not right that he should put forward those premiums as an allowable deduction against his wife.

I think that I have covered my main criticism of the report, and I only hope that that criticism will be of some assistance to the registrar who has to conduct this inquiry and make the final order.

Order accordingly.

Solicitors: *Boxall & Boxall; McMillan & Mott.*

J. B. G.

[SOUTHWARK CONSISTORY COURT.]

In re ST. JOHN THE DIVINE, RICHMOND.

1953
Feb. 26;
Mar. 16.

Chancellor
E. Garth Moore

Ecclesiastical Law—Principal or high altar—Faculty to substitute altar made of stone for one made of wood—Altar to stand in chancel and must be movable—No doctrinal significance attachable to the material used in construction—The 82*nd canon—Rubric in the book of Common Prayer.*

A faculty was sought for the installation in the sanctuary of a holy table made of stone to replace an existing table made of wood. The proposed altar would, if built, be immovable:—

Held, that ecclesiastical legislation by the 82nd canon, which demanded the provision of a movable table for the celebration of the Holy Communion, and the rubric at the beginning of the Book of Common Prayer, which stipulated that "chancels shall remain "as they have done in times past," by their combined effect required that, in accordance with the rubric, an altar should stand in the chancel, and that, in accordance with the canon, that altar should be movable, though neither the canon nor the rubric, singly or in combination, placed any prohibition on the provision of additional side altars whatever their material and whether fixed or movable. The stone altar proposed in the present petition would, if built, be immovable, and the faculty would, therefore, be refused.

In re St. Hilary, Cornwall, Roffe-Silvester v. *King* [1939] P. 64; 55 T.L.R. 33; [1938] 4 All E.R. 147 applied.

Per curiam: No doctrinal significance was to be attached to the name by which the article was called, whether table or altar, nor to its material, nor to its position in the church.

PETITION for a faculty.

On February 26, 1953, at a sitting of the consistory court for the diocese of Southwark, Chancellor E. Garth Moore heard the petition of the Reverend Richard Helby Chambers, the vicar, and Mr. C. H. Spring and Mr. G. R. Tyrell, the churchwardens, of the church of St. John the Divine for the installation of a stone altar to replace the existing altar which is made of wood. The petition was unopposed and had received the unanimous support of the Parochial Church Council and appeared to be generally approved in the parish.

W. S. Wigglesworth for the petitioners. The decision in *Roffe-Silvester* v. *King* [1] was that the principal altar of a parish church must be of wood and must be movable; the side or subsidiary altars, on the other hand, could be of stone or wood, movable or otherwise. [Counsel read the judgment of the Deputy-Dean in *Roffe-Silvester* v. *King*.[2]]

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[1] [1939] P. 64.

[2] Ibid. 78, 91.

That decision of the Deputy-Dean of the Arches produced a most unsatisfactory state of affairs and led to a request to the Archbishops to review canon 82 and, indeed, the whole of the canon law.

[The Canon Law of England, being a report of the Archbishop's Commission, was referred to.] Draft canon 97, " Of the " Communion Table," proposes that the principal altar should be constructed of either wood or stone. Canon 82 itself does not expressly state what material should be used. Nevertheless, the law was clearly to be found in the decision of the Court of Arches, namely, that there had to be in every parish church a wooden altar which was movable, and that there had to be at least one such altar; that was a minimum legal requirement. It is submitted that that was how canon 82 was interpreted in *Roffe-Silvester* v. *King*, but it did not lay down a rule requiring the principal altar to be of wood. Three of the four Houses of Convocation had already accepted draft canon 97 and were agreed that there was no doctrinal significance to be attached to the material of which an altar was constructed. (See the Journal of Convocation of York, January, 1952, at p. 98, and the Chronicle of Convocation of Canterbury, October, 1952, pp. 453–5.) If pre-Reformation altars were permitted in spite of their connexion with Roman observances (see *Hayes* v. *Fulford* [3]), it was not logical to object to a post-Reformation stone altar. It is true that there is a considerable weight of binding authority against me but, nevertheless, I invite the court to say that once a parish church was provided with one movable wooden altar, there may also be present other stone altars. This is an invitation to the court to anticipate a change in the law which must be considered to be imminent.

[*Faulkner* v. *Litchfield* [4]; *Liddell* v. *Beal* [5]; *St. Luke's, Chelsea* v. *Wheeler*,[6] were also referred to.]

Cur. adv. vult.

1953. March 16. CHANCELLOR E. GARTH MOORE read the following judgment: This is a petition by the vicar and churchwardens of the Church of St. John the Divine, Richmond, for a faculty to place in the church a stone altar in substitution for one made of heavy pitch-pine which at present serves as the principal or high altar. The petition is unopposed and has received the unanimous support of the parochial church council and appears to be generally approved in the parish. The proportions of the proposed new altar are such that it will be capable of taking the frontals which are used on the present altar. In the Lady Chapel of the church is another altar, made of oak, with a marble top, and light enough in weight to be easily moved. A large part of the money required for the project is already in hand, though not specifically allocated to this purpose. The vicar gave evidence and said that he thought that the present altar was ugly and unworthy of the church and less suitable to the character of the church than a stone one would be. He added, however, that it was normally concealed by its hangings, as would be the stone altar, if substituted, save, perhaps, during Holy Week.

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[3] [1910] P. 18, 23 n.

[4] (1845) 1 Rob.Eccl. 184.

[5] (1857) Moore's Special Report 186.

[6] [1904] P. 257.

Had I been satisfied that I had a discretion in the matter, I should have granted the faculty as prayed without more ado, but, when the petition was first lodged in the registry, I was doubtful about the legality of the object sought and the cause was accordingly put down for hearing in open court where it has been fully argued by Mr. Wigglesworth and now falls for determination.

In the course of his evidence the vicar said that he attached no doctrinal significance to the material of which the altar was made. I echo that opinion and go further. No doctrinal significance should be attached to the name by which the article is called, whether table or altar, nor to its material, nor to its position in the church. The words " altar " and " table " have been used interchangeably at many times in history, both before and after the Reformation, and the material used has varied considerably from age to age and from place to place. Some pre-Reformation altars were made of wood, and stone altars have been erected in both England and Ireland since the Reformation, even in the eighteenth century. The most that can be said about all these things is that they are capable of being employed in a way which emphasizes one or other of the many aspects which the richness of eucharistic doctrine provides. But it is as uncharitable as it is untrue to confuse emphasis with exclusion or to seek to interpret a rule for good order and uniformity as necessarily carrying a doctrinal and exclusive implication.

It so happens that in this particular instance the legislation which is germane to the question in hand is legislation of the seventeenth century. That was a time when feeling ran high and further schism was a very present danger. This led the wiser heads in the Church towards counsels of caution in an attempt to keep as many within the single fold as possible. It accounts for the quite deliberate lack of precision in the formularies of the Church on many points of doctrine. It accounts equally, I think, for many of the provisions concerning ceremonial, which is the handmaid of doctrine. The rules concerning holy tables, and the language in which those rules were framed, no doubt were more acceptable—intentionally so—to those who tended to emphasize the festal rather than the sacrificial nature of the Eucharist. But that is not to say that the sacrificial view was rejected, and evidence of its retention need be sought no further than the Order for the Administration of the Lord's Supper in the Book of Common Prayer, and, indeed, simply, perhaps, in the use of the term "priest" to signify the officiating minister.

I therefore approach the solution of the problem which this petition raises with the express disclaimer that any doctrinal significance whatever attaches to my decision, which is based, to the best of my ability, on the ordinary rules of construction used in all the courts of this realm.

The point in question is, I think, governed by two pieces of legislation, namely, the eighty-second canon and the rubric at the beginning of the Book of Common Prayer. The first, in effect, demands the provision of a movable table for the celebration of the Holy Communion, while the second stipulates that "the "chancels shall remain as they have done in times past." Both have been the object of judicial consideration.

In his classic judgment in *Faulkner* v. *Litchfield*[1] the Dean of the Arches, Sir Herbert Jenner Fust, appeared to hold that, since the table envisaged by the eighty-second canon must be movable, as a corollary it could not be of stone, and this decision was emphatically indorsed by the Privy Council in *Liddell* v. *Beal.*[2] It is to be noted that neither of these cases decides that there is anything illegal about a stone altar. They decide merely that the eighty-second canon is not satisfied unless the church is provided with a movable table. This left the field clear for Mr. Vaisey, as he then was, to argue in *Roffe-Silvester* v. *King*[3] that in that case it was unnecessary for a faculty to issue for the

[1] (1845) 1 Rob.Eccl. 184, 210.

[2] (1857) Moore's Special Report 186.

[3] [1939] P. 64, 83, 84.

removal of the principal altar which was made of stone, and that all that was required was that a faculty should be sought for the introduction of a movable table which did conform with the requirements of the eighty-second canon. By a parity of reasoning Mr. Wigglesworth has invited me to hold that I can grant the present application on the ground that the Church of St. John the Divine is already furnished with a movable altar in the Lady Chapel and that the canon is thereby already satisfied.

Apart from the fact that this side altar is not wholly of wood and, therefore, in the light of *Faulkner* v. *Litchfield*[4] and *Liddell* v. *Beal*,[5] may not itself comply with the canon, the difficulty in accepting this argument lies in the fact that, while it takes account of the requirement of the eighty-second canon that the table should be movable, it fails to take account of the rubric which requires that "the chancels shall remain as they have done "in times past," namely, furnished with an altar. The combined effect of the eighty-second canon and of this rubric appears to me to demand that, in accordance with the rubric, an altar should stand in the chancel and that, in accordance with the canon, that altar should be movable, though neither the canon nor the rubric, singly or in combination, places any prohibition on the provision of additional side altars, whatever their material, and whether fixed or movable. This difficulty appears to have been shared by the Deputy-Dean of the Arches in *Roffe-Silvester* v. *King*,[6] for, while he refused to order the removal of five side altars, each made of stone, he did order the removal of the principal altar, also made of stone, and held that the law required that that altar must be movable and made of wood. In deciding that the principal altar must be made of wood the Deputy-Dean was merely following dicta in *Faulkner* v. *Litchfield*[7] and *Liddell* v. *Beal*.[8] I think it possible, though not certain, that that particular question may still be open to argument; but the point is immaterial to the present discussion. What matters is that the Court of the Arches has held that the canon requires the altar in the chancel to be movable while the altar proposed in the present petition would, if built, be immovable. That decision is binding on me and, if I may say so with respect, was in my view inevitable, when one considers not merely the canon but also the rubric.

[4] 1 Rob.Eccl. 184.
[5] Moore's Special Report 186.
[6] [1939] P. 64.
[7] 1 Rob.Eccl. 184.
[8] Moore's Special Report 186.

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In these circumstances I have not thought it necessary to give further consideration to a number of cases in other dioceses, not reported and not binding on me, in which faculties have issued for the erection of stone altars. These cases, if one could have ascertained their facts, would have been of persuasive authority if the matter had not been already clearly concluded by binding authority.

Mr. Wigglesworth has invited my attention to a number of pronouncements from weighty sources, episcopal and otherwise, indicating a happy indifference to the material of which an altar may be made. I can give no practical effect, however, to such pronouncements; but they certainly strengthen me in the opinion that, rightly viewed, these matters are not of doctrinal significance. My attention has also been directed to the fact that the proposed new canon 97 will, if enacted, permit an altar to be of stone. But it has not been enacted, and, in the words of their Lordships in the Privy Council who heard the appeal in *Liddell* v. *Beal*,[8] "Courts of Justice . . . are bound to enforce "the law as they find it, leaving it to the legislature, if it see "fit, in any manner to alter it."

For these reasons I am compelled, with great reluctance, to reject the present petition.

It is, I think, as well to make it clear that I am constrained to this course first and foremost by the legislation of the Church in Convocation, and secondly by the Book of Common Prayer. This is no judge-made law, and it has not been imposed from without. It is in full measure the Church's own regulation. It was enacted, not to enshrine a principle, but as a matter of policy to meet a particular situation, and it may well be that it has outlived its usefulness. Indeed, in these days, when it would be highly eccentric to move the holy table for a celebration of the Sacred Mysteries, the requirement that the table should be movable smacks of unreality. But, until the regulation, born of ecclesiastical legislation, is by legislation repealed, the courts have no option but to comply with it, even though meantime it may mean that half the wood altars in England, by reason of their weight and consequent immobility, fail to comply with the canon—a consideration which may, perhaps, urge our legislative assemblies to greater speed.

I think that I should also make clear both what I am deciding and what I am not deciding. I am deciding no more than this:

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[8] Moore's Special Report 186.

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that in my judgment the law of the Church of England requires the high altar or principal holy table in a parish church to be movable, and, inasmuch as the altar proposed by this petition would not be movable, I cannot sanction it. There is no other matter which falls for determination. I am certainly not deciding that a stone altar is contrary to law. If it is not the principal altar in the church, I know of no reason why it should not be constructed of stone or of any other suitable material or combination of materials, and I know of no reason why it should not be fixed.

My sympathies are entirely with the petitioners, and if they think that the Court of the Arches can discover a way which has eluded me to give them what they want, they may tell that court that, if I had thought that I had a discretion in the matter. that discretion would have been exercised in their favour. But, if they do not wish to test the issue in a higher court, they must draw what comfort they can from the consideration that no question of conscience is involved and that, in a matter of no great moment, they are being afforded an opportunity to exhibit a virtue for which no school of thought in the Anglican Communion is conspicuously noted, namely, obedience to rule.

Petition refused.

Solicitor for the petitioners: *J. P. Winckworth.*

H. G.

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C. A.

1953 *Feb.* 20; *March* 6.

Singleton, Denning and Hodson L.JJ.

Husband and Wife—Divorce—Foreign divorce—Petition for declaration of validity—Husband domiciled abroad—Wife petitioner domiciled in England if divorce valid—Jurisdiction to entertain petition—R.S.C., Ord. 25, *r.* 5*—Matrimonial Causes Rules*, 1950, *r.* 80.

The petitioner, who before her marriage was a domiciled Englishwoman, was married in Israel to the respondent who was domiciled in Israel. Both were members of the Jewish faith. After the marriage they came to England where they lived together in London for a short time, the respondent retaining his Israeli domicile. The respondent was deported but the petitioner continued to reside in London. Before he left the country the respondent delivered a bill

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[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

of divorcement, which was recognized by the Jewish Rabbinical law as sufficient to dissolve a marriage, and this was received by the petitioner at the Beth Din, the court of the Chief Rabbi, in London. She thereupon petitioned the English court for a declaration that the marriage had been dissolved and no longer subsisted as from the date when she received the bill of divorcement, or alternatively, that she was no longer married to the respondent.

At the hearing of a summons for leave to proceed with the petition, Barnard J. held that the English court had no jurisdiction to hear the petition and dismissed the summons and the petition. On appeal:—

Held, (1) that R.S.C., Ord. 25, r. 5, was made applicable to practice and procedure in divorce by the Matrimonial Causes Rules, 1950, r. 80, and accordingly the Divorce Court had jurisdiction to make declaratory orders even though no other relief was sought:

Schuck v. *Schuck* [1950] W.N. 264; (1950) 66 T.L.R. (Pt. 1) 1179, and *Igra* v. *Igra* [1951] P. 404; [1951] 2 T.L.R. 670 approved.

(2) That the English court had jurisdiction to hear the petition, notwithstanding the fact that the respondent was domiciled in Israel, since it had jurisdiction to declare the status of the petitioner, if at the date of the institution of the proceedings she was domiciled in England. Whether she was so domiciled, depended on the validity of the divorce, which in turn depended on the law of Israel, and the English court could hear evidence of that law and itself determine whether the divorce was or was not valid by that law.

Per Singleton L.J. (differing): The State of Israel has its own courts, and I should have thought that it was desirable that they should determine a matter of this kind, which affects the position of two people of the Jewish faith and which raises the question of the validity of a bill of divorcement of the court of the Chief Rabbi.

White v. *White* [1937] P. 111; 53 T.L.R. 442; [1937] 1 All E.R. 708 applied.

De Reneville v. *De Reneville* [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56 distinguished.

Decision of Barnard J. [1952] W.N. 492; [1952] 2 T.L.R. 784; [1952] 2 All E.R. 821 reversed.

APPEAL from Barnard J.

By her petition, dated May 12, 1952, the petitioner alleged the following facts:—On January 10, 1950, she was lawfully married to the respondent, Elhanan Har-Shefi, at the office of the Chief Rabbinate of Jaffa and Tel-Aviv District, Israel. After the marriage they lived together at various places and finally came to England, where they lived at 25 Goldhurst Terrace, London. Custody of the child of the marriage had been awarded to the petitioner by an order of a magistrates' court dated August 13, 1951. At the date of the petition the petitioner was living in London, but the respondent had returned to Israel and was living in Tel-Aviv; the respondent was domiciled in Israel, but the petitioner was domiciled in England. On September 6, 1951, a Jewish bill of divorcement dissolving the marriage was received by the petitioner at the Beth Din, London, the court of the Chief Rabbi. At that date both the petitioner and the respondent were domiciled in Israel, and the bill of divorcement was valid to dissolve the marriage according to the law of Israel.

The petitioner prayed for a declaration that the marriage had been validly dissolved on, and no longer subsisted since, September 6, 1951, or alternatively, for a declaration that she was no longer married to the respondent.

At the hearing of a summons for leave to proceed with the petition, Barnard J. held that R.S.C., Ord. 25, r. 5,[1] did not extend the jurisdiction of the Divorce Court to entertain a petition which merely sought a declaration that a foreign decree of divorce was valid, and further, that the proper court to consider the validity of the divorce was the court of the domicile. As the respondent husband was domiciled in Israel the English court had no jurisdiction to entertain the petition. He therefore dismissed the summons and the petition.

The petitioner appealed to the Court of Appeal to set aside that order.

William Latey Q.C. and *John Mortimer* for the petitioner, the wife. Since 1924 the Divorce Division has had power to invoke the Rules of the Supreme Court in matters of practice and procedure: Matrimonial Causes Rules, 1924, r. 97; 1950, r. 80. Order 25, r. 5 of the Rules of the Supreme Court specifically provides that no proceeding shall be open to objection on the ground that a merely declaratory judgment is sought. The note in the Annual Practice, 1953, p. 264, which expressly excludes the right of the court to invoke the rule to make a declaration as to the validity of a divorce is wrong because it is based on the decision in *Countess de Gasquet James* v. *Duke of Mecklenburgh-Schwerin*,[2] which was decided in 1914. The decisions in *Schuck* v. *Schuck*[3] and *Igra* v. *Igra*[4] were based on the rule. In both those cases, which were suits for jactitation and for declarations as to the validity of a divorce, injunctions were refused but declarations were made, though it may be doubtful whether Ormerod J. was right in basing his decision in *Schuck* v. *Schuck* [5] also on "the established practice of the ecclesiastical courts," because the jurisdiction of those courts to make declaratory orders was confined to nullity suits.

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[1] R.S.C., Ord. 25, r. 5: "No "action or proceeding shall be open "to objection, on the ground that a "merely declaratory judgment or "order is sought thereby, and the "court may make binding declara- "tions of right whether any conse- "quential relief is or could be "claimed, or not."

[2] [1914] P. 53.

[3] [1950] W.N. 264; (1950) 66 T.L.R. (Pt. 1) 1179.

[4] [1951] P. 404.

[DENNING L.J. The question is whether the court can make a declaration on a petition which seeks no other substantive relief.]

In the two cases cited above the petitions for jactitation were dismissed but declaratory orders were made. In *Guaranty Trust Co. of New York* v. *Hannay & Co.*[6] it was decided that the court has power under Ord. 25, r. 5, to make a declaration even though the person seeking the declaration has no cause of action, and that the rule so construed is merely a matter of practice and procedure and is not ultra vires. If that is right the court has power to allow this petition to be set down for hearing.

As to jurisdiction, the English court has jurisdiction to hear a petition where the respondent husband is domiciled abroad if the wife petitioner is domiciled in this country: *White* v. *White.*[7] In *De Reneville* v. *De Reneville* [8] it was held that a wife who was only resident within the jurisdiction of the English court could not bring proceedings in England if her husband was domiciled abroad, but Lord Greene M.R.[9] distinguished the case of *White* v. *White*,[10] which turned on the wife's domicile. This case is similar to *White* v. *White* [10] because the petitioner is an Englishwoman who claims to be domiciled in this country and who intends to make her permanent home here.

[SINGLETON L.J. In *White* v. *White* [10] there was no valid marriage and therefore the wife never lost her English domicile. In this case there was a valid marriage and the wife took her husband's domicile.]

That was Barnard J.'s [11] second reason in refusing leave to proceed, but there was no real foundation for it. His first reason was that no proceeding could be brought which merely asked for a declaration without asking for any relief. That is clearly contrary to the wording of Ord. 25, r. 5. All I am asking is that the court should decide that there is no valid reason why the

[5] [1950] W.N. 264; 66 T.L.R. (Pt. 1) 1179, 1181.

[6] [1915] 2 K.B. 536.

[7] [1937] P. 111; 53 T.L.R. 442; [1937] 1 All E.R. 708.

[8] [1948] P. 100.

[9] Ibid. 117.

[10] [1937] P. 111.

[11] [1952] W.N. 492; [1952] 2 T.L.R. 784; [1952] 2 All E.R. 821.

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proceedings should not be allowed to continue so that the facts can be determined. As it is, the petitioner can take no other proceedings to have her status defined unless she makes a fictitious allegation of boasting. The whole question of the petitioner's status is involved because if she marries again without her status being determined she will run the risk of being prosecuted for bigamy. She will be strongly protected if she is armed with a declaration from the court that her former marriage has been validly dissolved.

The respondent did not appear and was not represented.

Cur. adv. vult.

March 6. SINGLETON L.J. The petitioner, Hannah Har-Shefi, prays for: (1) A declaration that the marriage has been validly dissolved on, and no longer subsists since, September 6, 1951; (2) alternatively, a declaration that she is no longer married to the respondent. That is all.

[His Lordship read the petition, setting out the facts as stated above, and continued:] In view of the unusual character of the petition, the registrar declined to set down the case for trial without directions from the judge. Accordingly, the petitioner took out a summons for leave to proceed with her petition, and asking that the case be set down for trial. The summons was heard by Barnard J., who refused the application of the petitioner and dismissed the petition. The petitioner appeals to this court, and two questions arise. The first is whether the court has jurisdiction to hear a petition of this nature, which seeks a declaration and nothing beyond that. In considering this question, I do not think that any good purpose is served by examination of the practice of the ecclesiastical courts of old, though it may be that Ormerod J. in *Schuck* v. *Schuck*,[1] over-stated it to some extent when he said: "It appears "from the authorities that it was the established practice of the "ecclesiastical courts to make such declaratory orders, and I see "no reason why, if the circumstances are proper, such an order "should not be made in the present case."

Since the year 1924 the Rules of the Supreme Court have applied in matrimonial suits in any matters of practice or procedure which are not governed by statute or dealt with by the Matrimonial Causes Rules. (See r. 97 of the rules of 1924 and

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[1] [1950] W.N. 264; (1950) 66 T.L.R. (Pt. 1) 1179, 1181.

r. 81 of the rules of 1937.) The rule now in force is r. 80 of the Matrimonial Causes Rules, 1950: " Subject to the provisions of " these rules and of any enactment, the Rules of the Supreme " Court shall, notwithstanding the provisions of Order 68 thereof, " apply with the necessary modifications to the practice and " procedure in any cause or matter to which these rules apply."

This brings into play the provisions of Ord. 25, r. 5, which provides: " No action or proceeding shall be open to objection, " on the ground that a merely declaratory judgment or order is " sought thereby, and the court may make binding declarations " of right whether any consequential relief is or could be claimed, " or not." This rule was said by a majority decision of this court in *Guaranty Trust Company of New York* v. *Hannay & Co.*[2] to be " merely an extension of the practice and procedure of the " court." Once it is clear that Ord. 25, r. 5 applies to proceedings in the Divorce Court it seems to me that a petition cannot be dismissed solely by reason of the fact that all that is sought is a merely declaratory judgment. None the less, as the authorities cited in the notes to Ord. 25, r. 5 show, any such claim will be carefully watched. The court will not grant a declaration in the air. It is impossible to say from the petition—and that is all that we have—whether the petitioner can show a case entitling her to the declaration which she seeks. That can, I think, only be determined on the hearing of the petition itself. There may be nothing on which the aid of the court can properly be invoked; on the other hand, it is possible that the petitioner may be able to show grounds which would justify the granting of a declaration.

The other question depends on domicile. Barnard J. reached the conclusion that the proper court to consider the validity of the divorce said to have been granted on September 6, 1951, is the court of domicile, and that the English courts had no jurisdiction to entertain the petition. There is much to be said for that view. The marriage took place at the office of the Chief Rabbinate of Jaffa and Tel-Aviv District. The petition states that the Jewish bill of divorcement was received by the petitioner at the Beth Din, London, and that at the date of the bill of divorcement both petitioner and respondent were domiciled in Israel. She states in paragraph 4 that she is domiciled in England and that the respondent is domiciled in Israel. Prima facie, she would retain the domicile of her husband. If there were a valid decree of divorce she might well acquire another domicile, but that cannot be determined without a finding on the decree of divorce. The State of Israel has its own courts, and I should have thought that it was desirable that they should determine a matter of this kind, which affects the position of two people of the Jewish faith, and which raises the question of the validity of a bill of divorcement of the court of the Chief Rabbi. I do not know that it would be necessary for her to go to Tel-Aviv. I feel that we ought to have more information before the courts of this country assume jurisdiction. This is an unusual proceeding, and it may well be that the question is capable of easy solution by some tribunal or body.

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[2] [1915] 2 K.B. 536.

I cannot see that there would be any hardship on the petitioner if we refused jurisdiction, except that she has legal aid here, and that might not apply (or be necessary) elsewhere. However, I say no more on this subject as both my brethren hold the view that the petitioner should be allowed to proceed—which means that the appeal must be allowed.

DENNING L.J. The question in this case is whether the Divorce Court has jurisdiction to make a declaration as to the validity of a divorce. The facts have not yet been judicially ascertained, but we are asked by Mr. Latey to assume that he will be able to prove these facts. The wife, who is a Jewess, was before her marriage an Englishwoman domiciled in England. The husband, who is a Jew, was domiciled in Israel. On January 10, 1950, they were lawfully married at Tel-Aviv in Israel at the office of the Chief Rabbinate. They afterwards came to England, but the husband committed a criminal offence and was deported. Before he went, however, he delivered a gett, which is a letter of divorce, recognized by the Jewish Rabbinical law as sufficient to dissolve a marriage, provided that the requisite formalities are complied with. This bill of divorcement, as it is called, was received by the wife at the Beth Din, London, which is the court of the Chief Rabbi. Mr. Latey hopes to prove that that bill of divorcement was valid to dissolve the marriage according to the law of Israel. The husband, on his deportation from this country, returned to Israel, where he is said to have since married another woman, or, at least, gone through a form of marriage with her. The wife has decided to make England her permanent home, and now applies to the Divorce Court in this country for a declaration that the bill of divorcement was valid to dissolve the marriage. The case has not, however, been allowed to go for trial, because the judge has ruled that the English court has no jurisdiction to entertain it.

The first question is one of procedure only. It is whether the Divorce Court has jurisdiction to entertain a petition for a declaration when it is not attached to any other claim for relief. I am clearly of opinion that it has jurisdiction to do so. The ecclesiastical courts habitually entertained suits for declarations only. For instance, they entertained nullity suits, that is, suits of which the sole object was to obtain a declaration that what purported to be a valid marriage was in law a nullity. They did this not only in the case of a marriage which was void from the beginning, such as a bigamous marriage, but also in the case of a marriage which was only voidable as, for instance, a marriage voidable for impotence. (See Shelford on Marriage (1841), pp. 565 to 572.) The reason why the ecclesiastical courts exercised this declaratory jurisdiction was on the ground that it was material for the sake of the parties and that of the public that their status should be known; and the object of the proceedings was to have the status of the parties to the marriage defined by the sentence of a competent court. (See *Ray* v. *Sherwood*.[3]) That reasoning is wide enough to justify a general jurisdiction to make declaratory orders, and I do not think that the force of it is taken away by the undoubted fact that there was one particular exception to it, namely, that the ecclesiastical courts would not entertain a suit for a declaration as to the validity of a marriage. (See *Countess de Gasquet James* v. *Duke of Mecklenburg-Schwerin*.[4])

That was an omission which was regretted by Lord Brougham, but it was mitigated by the numerous ways available to people who wanted to establish the validity of marriages. For instance, if the validity of a marriage was in issue in certain real actions in the temporal courts, such as a writ of dower, it was the regular practice for the temporal courts to send that issue to the ecclesiastical courts. The ecclesiastical courts would hold a trial of the issue. They would make proclamation requiring persons interested to come in and be made parties; and after the trial they would give their certificate (called a Bishop's certificate) as to the validity or invalidity of the marriage, and the certificate was perpetual and conclusive evidence against all the world on the point. That certificate was nothing more nor less than a declaratory judgment. The practice is well described in Burn's

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[3] (1836) 1 Curteis Rep. 193, 227.

[4] [1914] P. 53, 69; 30 T.L.R. 329.

Ecclesiastical Law (1842) at pp. 485 and 486, and in the *Duchess of Kingston's* case.[5] In addition to that practice, suits for restitution of conjugal rights were on occasion used for the purposes of establishing the validity of a marriage, in much the same way as the Scots declarator of marriage was used, though there are only very few instances of this. (See Burn's Ecclesiastical Law, vol. 2, at p. 500.) Again, suits for jactitation of marriage were at one time frequently used for the like purpose, but they were discredited by the *Duchess of Kingston's* case [5] in 1776 and rarely used thereafter.

Whatever be the reason why the ecclesiastical courts did not grant declarations of validity, there can be no doubt that they granted declarations of nullity when marriages were avoided; and the reasoning on which these declarations were based supports the view that the ecclesiastical courts had a general jurisdiction to make declaratory orders as to the existence or non-existence or nullity of a marriage, even though no other relief was sought. If this is so, it follows that the Divorce Courts have inherited a like jurisdiction under section 22 of the Matrimonial Causes Act, 1857. But even if the ecclesiastical courts had no such jurisdiction, I am of opinion that the Divorce Courts have outgrown the disability. Since 1924 they have acquired under Ord. 25, r. 5, a jurisdiction to make declaratory orders just like the other Divisions of the High Court. It was so held by Ormerod J. in *Schuck* v. *Schuck*,[6] and by Pearce J. in *Igra* v. *Igra*,[7] and I agree with them.

Barnard J. said that those two cases were distinguishable from the present because each was a properly constituted petition for jactitation of marriage, that is, for wrongfully boasting or asserting that a marriage existed when it did not. I do not think that that is a valid ground of distinction. In each case the claim for jactitation failed, and so the declaratory order had to stand on its own bottom. Apart from that, I do not think that we ought to use suits for jactitation today for this purpose. The drawback of such suits was exposed in the famous case of the *Duchess of Kingston* [8] in 1776. The Duchess was married first to a Mr. Hervey, and then, whilst he was still living, she went through a form of marriage with the Duke. In the hope of avoiding a charge of bigamy, she brought a suit in the ecclesiastical

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[5] 2 Sm.L.C., 13th ed., 644, 645, 646.

[6] [1950] W.N. 264; 66 T.L.R. (Pt. 1) 1179.

[7] [1951] P. 404; [1951] 2 T.L.R. 670.

[8] 2 Sm.L.C., 13th ed., 644, 645, 646.

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courts against Mr. Hervey for jactitation, and she succeeded in obtaining a decree against Mr. Hervey on the basis that her marriage to him was invalid. There was more than a suspicion that that decree was obtained in collusion with Mr. Hervey. Afterwards, when she was tried for bigamy, she set up the ruling of the ecclesiastical courts as conclusive to show that her first marriage was invalid; but she failed. The judges held that a suit for jactitation of marriage "is ranked as a cause of defamation only and not as a matrimonial cause"; and a sentence in favour of the petitioner in such a suit is not conclusive as to the existence or non-existence of the marriage.[9] After that case suits for jactitation fell into disrepute (see Burns on Ecclesiastical Law, p. 500); and I do not think that we ought to revive them today to support a declaratory order. It would be absurd if a petitioner had to insert a fictitious or unjustified claim for jactitation in order to get a declaratory order. I prefer to hold simply that under the modern rules the Divorce Court has jurisdiction to make a declaratory order even though no other relief is sought.

The second question is whether this declaratory jurisdiction can be exercised in the present case. The couple here were both domiciled in Israel at the time of the divorce. If they had both remained domiciled in Israel after the divorce the English courts would clearly have had no jurisdiction to pronounce upon its validity. Even if the wife was resident in England, nevertheless, if she had remained domiciled in Israel, the English courts would have had no jurisdiction (see *De Reneville* v. *De Reneville*,[10] overruling *Robert* v. *Robert*[11]) unless she could bring herself within section 18 of the Act of 1950, which is not the case here. But it is said that the wife has, since the divorce, resumed her English domicile and that that is sufficient to give these courts jurisdiction to declare her status, just as domicile gave jurisdiction in *White* v. *White*,[12] as explained in *De Reneville* v. *De Reneville*.[13]

That involves a nice question: Has she resumed her English domicile? That depends on whether the divorce was valid or not. If the divorce was valid, she was free to resume her English domicile, and she has in fact resumed it; but if the divorce was invalid, she is still married to her husband and she retains his domicile. So the jurisdiction of the court depends on the validity of the divorce; and that depends in turn on the law of Israel. I do not think that we should send the wife to Israel to determine that question. The English courts can hear evidence of Israel law and can decide whether the divorce was valid by that law or not. If it was valid by that law, then the English courts have jurisdiction to declare it to be so. A similar course was envisaged in *De Reneville* v. *De Reneville*,[14] where Lord Greene M.R. said that the English courts could hear evidence of French law to decide whether a French marriage was void or voidable, and hence whether the English courts had jurisdiction or not.

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[9] 2 Sm.L.C., 13th ed., 650, 651.

[10] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[11] [1947] P. 164; 63 T.L.R. 343; [1947] 2 All E.R. 22.

[12] [1937] P. 111; 53 T.L.R. 442; [1937] 1 All E.R. 708.

[13] [1948] P. 100.

I do not place any reliance on the fact that the bill of divorcement was delivered in England. That does not make English law applicable to determine the status of the wife. The parties were at the time of the divorce domiciled in Israel, and the validity of the divorce must depend on the law of Israel and not on the law of England. Nevertheless, accepting that the status depends on the law of Israel, I see no reason why the English courts should not hear evidence upon the law of Israel and pronounce upon it. Over 150 years ago Lord Stowell tried the great case of *Lindo* v. *Belisario* [15] on the validity of a Jewish marriage according to Jewish law. (That was, incidentally, a suit for jactitation.) So there is no reason today why the courts of this country should not decide on the validity of a Jewish divorce according to the law of Israel.

In conclusion, I would only say that the petitioner is an Englishwoman resident in this country, and she intends to make her life here. She wants to know how she stands in this country. All she asks the English court to do is to tell her whether she is to be regarded in this country as a single or as a married woman. It is a matter of the utmost importance to her and to others, and I see no reason why she should be forced to go to Israel to have the matter determined. In my opinion, the English courts have jurisdiction to determine her status, and should do so. The appeal should accordingly be allowed.

HODSON L.J. The petition presented on May 12, 1952, is unusual in form. No relief is asked for against the respondent. The petition recited, inter alia: (1) The marriage, which took place in the State of Israel; (2) a divorce in England, said to be

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[14] [1948] P. 100, 115.

[15] (1795) 1 Hag.Con. 216.

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valid according to the law of Israel, the country of the husband's domicile; (3) the petitioner's English domicile; and prayed for a declaration that the marriage had been validly dissolved and no longer subsisted. Order 25, r. 5, of the Rules of the Supreme Court is relied on, as applying by virtue of the terms of r. 80 of the Matrimonial Causes Rules, 1950.

It is pointed out that declarations of this kind have recently been made in proceedings for jactitation of marriage, namely, in *Schuck* v. *Schuck*[16] and *Igra* v. *Igra.*[17] In each of those cases, although relief was asked for in the form of an injunction to restrain the respondent from asserting the marriage, such relief was refused and naked declarations were made.

I do not think that it can be said that the fact that no relief is sought in the case now under consideration is a valid reason for distinguishing those cases. It might, perhaps, be argued that those cases were wrongly decided, and that Ord. 25, r. 5, does not extend the jurisdiction of the court so as to enable it to act as the petitioner desires. This argument is not, I think, open since the decision of this court in *Guaranty Trust Company of New York* v. *Hannay & Co.*,[18] which shows that the rule does not enlarge jurisdiction, but is concerned only with practice and procedure.

Any doubts as to the correctness of the decisions in the two recent cases mentioned which may be based on a reading of the judgment in *Countess de Gasquet James* v. *Duke of Mecklenburg-Schwerin*,[19] are, I think, set at rest when it is appreciated that this decision was given before 1924 when the Matrimonial Causes Rules first made the Rules of the Supreme Court applicable to matrimonial causes.

Nothing that I have said is intended to encourage applications for what may be called naked declarations, where no sensible purpose is served thereby; but in the circumstances of this case, on the footing that the petitioner is domiciled in England and is genuinely uncertain as to her status, I see no reason why the rule should not be invoked.

The judge did not, however, rest only on the ground that Ord. 25, r. 5, was inapplicable. He took the further point that the petition was analogous to a petition for nullity, and that the petitioner was not entitled to invoke the jurisdiction of the court simply on the ground that she was resident in England. He quoted

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[16] [1950] W.N. 264; 66 T.L.R. (Pt. 1) 1179.

[17] [1951] P. 404.

[18] [1915] 2 K.B. 536.

[19] [1914] P. 53.

Lord Greene M.R. in *De Reneville* v. *De Reneville*[20]: "That a "wife who is resident but, ex hypothesi, not domiciled here can "compel her husband who is both domiciled and resident abroad "to come to this country and submit the question of his status "to the courts of this country appears to me to be contrary both "to principle and convenience." This passage deals only with residence and does not cover the case of a wife domiciled in England who seeks a decree of nullity from a husband domiciled elsewhere.

Such a case was *White* v. *White*,[21] discussed and approved on the relevant point by the Master of the Rolls in the *De Reneville* case[22]: "In *White* v. *White*[23] my brother Bucknill "used words with which (save as regards the reference to residence which was in my opinion unnecessary) I respectfully "agree. He said: 'It seems to me just to the petitioner and "'also in the public interest that the petitioner, being domiciled "'and resident in this country should have her status as a single "'or as a married woman judicially established by this court.' "This view does, of course, theoretically at least, open up the "possibility of conflicting judgments by the courts of the "respective domiciles. But if it be not the right view, and if "the only court with jurisdiction is a court in a country where "both are domiciled, the problem of jurisdiction based on "domicile in the case of a void marriage where the domiciles "are different would appear to be insoluble."

In *White's* case[23] the crucial fact that the marriage was bigamous was assumed, so giving the wife an English domicile ab initio up to and including the date of the petition, although on a failure to establish the fact the wife would not have been domiciled in this country. Similarly here, on the face of the petition, the crucial fact that the wife has been validly divorced must be assumed so as to give her an English domicile at the material date, namely, the date of the institution of these proceedings. The petitioner, therefore, is, in my opinion, in as good a position as was the petitioner in *White's* case[23] to invoke the jurisdiction of this court notwithstanding the risk of conflicting judgments by the courts of the respective domiciles envisaged by the Master of the Rolls in *De Reneville's* case.[24]

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[20] [1948] P. 100, 118.

[21] [1937] P. 111, 125, 126.

[22] [1948] P. 100, 113.

[23] [1937] P. 111.

[24] [1948] P. 100.

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I should add that the petitioner in the last-mentioned case failed in her attempt to invoke the jurisdiction of this court against a respondent domiciled abroad because she could not establish an English domicile, but only an English residence. She took the domicile of her husband on the marriage, which was voidable, not void, and the court refused to relate back the decree which she claimed so as to treat her as entitled to an independent domicile at the time of the institution of the proceedings. I do not think that the *De Reneville* case [24] is an authority for refusing jurisdiction to the petitioner in this case, although I agree with Barnard J. that petitions for nullity are analogous, and I think that questions of jurisdiction in such cases as this should be decided on the same principles as questions of jurisdiction in nullity cases. It is also to be noticed that in nullity cases the question of jurisdiction in cases where the parties have not the same domicile is left open by the decision of the House of Lords in *Salvesen* v. *Administrator of Austrian Property.*[25] Lord Haldane said [26]: "Whether there cannot be jurisdiction which "is not that of the domicile in restricted instances to entertain "a suit for nullity is a question we have not before us for "determination."

I would allow the appeal.

Appeal allowed.

Solicitor: *G. Parry-Jones, The Law Society.*

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[24] [1948] P. 100.

[25] [1927] A.C. 641, 645; 43 T.L.R. 609.

[26] [1927] A.C. 641, 654.

1953
Jan. 30.

Pearce J.

SILVERSTONE *v.* SILVERSTONE.

Husband and Wife—Divorce—Injunction—Petition pending—Husband restrained from entering matrimonial home—Husband the owner.

The Divorce Court has power to restrain a husband from entering the matrimonial home, pending the hearing of a petition, although he is the owner of the premises.

CROSS-SUMMONSES for injunctions.

In this case the wife petitioner applied to continue an injunction obtained by her against her husband, the respondent, to prevent him, pending the hearing of a divorce petition, from using a flat which had been the matrimonial home for 12 years. She obtained the injunction ex parte before Upjohn J. on December 23, 1952. Later, on notice and after argument, Pearson J. continued the injunction until such time as it could be heard by this court.

The parties had been married for 30 years. The flat belonged to the husband. The wife claimed that she owned substantially all the furniture. The husband made a similar claim. A petition for judicial separation was pending in which she alleged cruelty and adultery. There was also pending litigation about the furniture.

C. N. Shawcross Q.C. and *Alan Campbell*, for the wife, submitted that upon the evidence before the court the injunction should be continued.

Alan Bray for the husband. The husband is the owner of the matrimonial home, in which the wife has no legal or equitable interest, and it is submitted that in such circumstances the court has no power in law to restrain the husband from entering it. It is not desired to deprive the wife of the home, but the husband wishes to use it, and if the wife is unwilling to share it he is prepared to make an allowance for her adequate accommodation elsewhere. The reported cases show that where such an injunction has in fact been granted the wife has had some proprietary interest in the home; in no case has the husband been restrained where the wife had no such interest.

[He referred to *Richman* v. *Richman*[1]; *Hill* v. *Hill*[2]; *Bendall* v. *McWhirter*[3]; *Callaby* v. *Callaby and Perowne*[4]; *Boyt* v. *Boyt*[5]; *Symonds* v. *Hallett*[6]; *Willmott* v. *Willmott*[7]; *Murcutt* v. *Murcutt*[8]; Kerr on Injunctions, 6th ed., at pp. 3–4. He submitted that the passage in *Bendall* v. *McWhirter*,[9] though a matter for consideration, was obiter, and therefore not decisive of the issue.]

C. N. Shawcross Q.C. in reply referred to *Hutchinson* v. *Hutchinson*[10]; *Pargeter* v. *Pargeter*[11]; *Lee* v. *Lee*.[12]

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[1] (1950) 66 T.L.R. (Pt. 2) 44; [1950] W.N. 233.

[2] [1916] W.N. 59.

[3] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[4] (1920) 37 T.L.R. 241.

[5] [1948] 2 All E.R. 436.

[6] (1883) 24 Ch.D. 346.

[7] [1921] P. 143; 37 T.L.R. 429.

[8] [1952] P. 266; [1952] 2 T.L.R. 274; [1952] 2 All E.R. 427.

[9] [1952] 2 Q.B. 466, 477.

[10] (1947) 63 T.L.R. 645 (sub nom. *H.* v. *H.*); [1947] 2 All E.R. 792.

[11] [1946] 1 All E.R. 570.

[12] [1952] 2 Q.B. 489.

PEARCE J., after stating the above-mentioned facts:—Voluminous affidavits have been filed dealing with many controversial points. When one is exercising one's discretion in an interlocutory judgment it is very undesirable to express opinions on questions of fact that will later be decided between the parties on oral evidence given at the trial. I do not propose to do so.

It is argued by counsel for the husband that there is no case in which a husband has been excluded from premises of which he is the owner and no case in which a wife who has no definite legal or equitable interest in the premises has been able to exclude the husband. He argues that I have no power in law to enjoin the husband against entering his own flat. He concedes that, if he is right in law, the effect would be that where a wife, possibly with small children, has been treated cruelly by a husband owning the home, and has filed a petition on that ground, she would be at the mercy of her husband pending the hearing if he insisted on returning to the house and living there; he might by moral pressure force her either to abandon her petition or go out of the home with her small children. And the court would be powerless to prevent that injustice. That is not a merely problematical case, since I have had to deal with such cases as those and I have dealt with them by making the order now asked for, so that a wife and children might be secured in their home until the trial of the action.

The husband, in his turn, is asking me for an order to restrain the wife from interfering with his use of the flat. Mr. Bray's argument is that I am entitled to leave the wife in the flat, but that as the husband is prepared to share it with her I cannot prevent him living there. In my view that argument is incorrect.

The wife is not without rights in the matrimonial home even though it belongs to the husband. Denning L.J. has expressed the following view in *Bendall* v. *McWhirter*[1]: "In "my opinion, therefore, the right of a deserted wife to stay in "the matrimonial home proceeds out of an irrevocable authority "which the husband is presumed in law to have conferred on "her. This accounts for the fact that the husband cannot turn "the wife out. It also accounts for the fact that, as against the "landlord, the wife must assert her right in the husband's name.

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[1] [1952] 2 Q.B. 466, 477; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

"The authority which is thus conferred on her is an authority "to stay in the house until the court orders her to go out. This "authority flows from the status of marriage, coupled with the "fact of separation owing to the husband's misconduct. It "ceases when the marriage comes to an end by death or divorce "(*Robson* v. *Headland* [2]), but it does not cease when there is "a judicial separation: *H.* v. *H.*[3] The authority is, of course, "purely personal to her. She alone can exercise it. She "cannot assign it. It does not give her any legal interest "in the land. She may perhaps sublet some of the rooms "so as to help keep herself; but even then, she does so, "not out of any legal interest of her own in the land but on the "presumed authority of her husband. Her possession is not "always exclusive. If the husband has only been guilty of "desertion and nothing else, he is entitled to come back at any "time asking to be forgiven, and she is then bound to receive "him. She cannot then keep him out of his house. But if he "has, in addition to desertion, been guilty of cruelty or adultery, "she is not bound to take him back. She can keep him out of "the house. Her possession may then be quite exclusive. But "whether her possession is exclusive or not, there can be no "doubt that she is not a tenant of her husband."

It is not necessary here to decide the exact nature of a wife's right or to say that it goes to the full extent of the words quoted. In my view she has a right to be in the matrimonial home while a petition is pending before this court, and this court is entitled to protect that right and ensure that pressure is not put on a wife to abandon her petition by evicting her from the home. In the present case I am satisfied that if I let the husband go back to the house I am really driving her out.

This Division of the High Court deals with problems somewhat different from those of other Divisions, and the position pending trial is one of its particular problems. In order to protect the position of a wife pending trial this court may order a husband to pay to the wife alimony pendente lite and security for her costs even although she appears to have little chance of success in her litigation. It is desirable, if its powers allow, that it should prevent her being bullied out of her remedy or deterred by pressure from seeking the help of the court. If Mr.

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[2] (1948) 64 T.L.R. 596; [1948] W.N. 438.

[3] (1947) 63 T.L.R. 645; [1947] 2 All E.R. 792.

Bray's argument is right, there is a serious and regrettable gap in the powers of this court. But in my view his argument is not right and I have a discretion.

The practical common sense of the position is that I am deciding who is the person who goes out and who is the person who stays in the home pending the trial. The fact that the husband is the owner of the flat is obviously of importance. On the other hand, this has been the wife's home for 12 years out of a 30-year marriage. She says that the furniture is hers, but she may be proved wrong at the trial. The husband has of late been away for many periods from the flat, although the extent of his absences is disputed. He has of late been living in a flat somewhere else, a flat belonging to the woman named. Owing to the directions I have given, this case will be tried in six weeks or so from now. A speedy trial is really the only proper solution to this sort of case, because any interlocutory order by way of injunction or otherwise may bear hardly on one party or the other and create an injustice until the subsequent trial determines the truth of the case. I think that the fair way of dealing with the matter for the next six weeks is to leave the wife in possession of the flat and to make any provisions possible to ensure that she does not inconvenience the husband thereby more than is absolutely necessary.

Mr. Bray says that by preventing the husband from returning home I might be preventing a reconciliation which he now desires. I do not agree. On the evidence of incidents set out in the affidavits I am satisfied that if I were at this moment to let these two persons share the flat and come up against one another constantly pending the trial any attempt at reconciliation would be quite futile. I have arranged that the court welfare officer, shall visit them both. It is very desirable after a marriage has lasted 30 years that one should fully explore the possibility of reconciliation. If, as a result of interviews with the welfare officer it is desired that the injunction should be altered in any way, that can easily be done by a consent order in chambers. I shall, pending the trial of the action, continue the injunction which has been granted.

Solicitors: *Howard, Kennedy & Co.; Alec Woolf & Turk.*

J. B. G.

WOZNIAK *v.* WOZNIAK.

C. A.

1953
Apr. 15.

Denning and Hodson L.JJ., Lloyd-Jacob J.

Husband and Wife—Divorce—Legal aid—Costs—Interlocutory proceedings—Applicant ordered to pay costs—Amount assessed—No power to assess amount of costs until trial—Meaning of "matrimonial "cause"—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *ss.* 2 (2) (*e*), 17 (1)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 17 (1).

Where a litigant is legally assisted, a master or judge may on an interlocutory application make an order for costs against him in the ordinary way, but the Legal Aid and Advice Act, 1949, and the regulations made thereunder, deprive him of the power to assess the amount of the costs and to order their payment forthwith, since pursuant to regulation 17 (1) the amount payable cannot be determined until the trial or hearing of the action, cause or matter.

Per Denning L.J.: (1) The power to determine the amount of costs under regulation 17 of the Legal Aid (General) Regulations, 1950, is the same in a matrimonial cause, a Queen's Bench action, or a Chancery matter. Matrimonial causes do not stand in a class by themselves in this respect. (2) The only way in which a judge can express immediately his disapproval of an application is, in a proper case, to say that the solicitor for the legally assisted person who took out the misconceived application shall not have his costs against the fund.

Order of Karminski J. [1953] 2 W.L.R. 662 reversed.

INTERLOCUTORY APPEAL from Karminski J.[1]

On September 25, 1952, the wife filed a petition for divorce against her husband. Both parties obtained certificates for legal aid under the Legal Aid and Advice Act, 1949. The husband's legal advisers applied for further particulars to be delivered by the wife. No particulars were delivered within the stated time, as the wife had to obtain information from Egypt as to the validity of a marriage in Egypt during the war, and an application was made on behalf of the husband to Karminski J. for a writ of attachment against the wife for failing to deliver particulars. Some particulars, which the husband's legal advisers did not consider sufficient, were in fact delivered on February 3, 1953.

On February 4, 1953, Karminski J. heard the application and dismissed it on the ground that it was completely misconceived and ought never to have been made. He ordered the husband to pay the costs of the application, assessing them at £10, and directed that they should be paid forthwith.

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[1] [1953] 2 W.L.R. 662.

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Before the order was drawn up, Karminski J., on February 17, heard further argument on the question whether the court had power to condemn an assisted person in the costs of an interlocutory application in a matrimonial suit which had not yet been tried. After considering the definitions of "matrimonial cause" in section 225 [2] of the Supreme Court of Judicature (Consolidation) Act, 1925, and in section 17 (1) [3] of the Legal Aid and Advice Act, 1949, he said that there was a difference of meaning in those words in the two statutes and held that the words "in connexion with "a matrimonial cause" in the Act of 1949 gave him jurisdiction to condemn an assisted person in costs in a proper case. He varied the order of February 4 only by making the amount payable in monthly instalments of £1.

The husband appealed.

G. L. S. Dobry for the husband. The question of practice is whether an assisted person who is condemned in costs on an interlocutory application shall have the amount of his liability for costs assessed at the hearing of any interlocutory application, or on one occasion only, i.e., at the final trial or hearing. It is submitted that though prima facie an assisted person is liable in costs like any other litigant, the Legal Aid and Advice Act, 1949, and the regulations made under it, in particular regulation 17 (1) (*a*) of the Legal Aid (General) Regulations, 1950,[4] intend that the assessment is to be made on one occasion only and is to be final. By section 2 of the Act and subsection (2) (*e*) thereof, the court in assessing costs has to consider the means and conduct both of the assisted person and the other party. The regulations provide for an elaborate inquiry into the assisted person's means. It cannot have been intended that all this had to be done on each interlocutory application and it would greatly increase the expense of administering the Legal Aid Scheme.

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[2] Supreme Court of Judicature (Consolidation) Act, 1925, s. 225: ". . . 'matrimonial cause' means "any action for divorce, nullity of "marriage, judicial separation, jactitation of marriage or restitution of "conjugal rights."

[3] Legal Aid and Advice Act, 1949, s. 17 (1): "In this Part of this Act, "unless the context otherwise requires "— . . . the expression 'matrimonial "'cause' means proceedings in the "House of Lords or the Supreme "Court in or in connexion with a "matrimonial cause or matter within "the meaning of the Supreme Court "of Judicature (Consolidation) Act, "1925."

[4] Legal Aid (General) Regulations, 1950: "17.—(1) Where an order for "costs is made against an assisted "person, then . . . (*a*) the determination of the amount of his liability "for costs in accordance with section "2 (2) (*e*) of the Act shall, save as "is hereinafter provided, be made at "the trial or hearing of the action, "cause or matter and be final. . . ."

Karminski J. took the view against the appellant that an interlocutory application in matrimonial proceedings was a "matrimonial cause" as defined in section 17 (1) of the Act of 1949. It is submitted that those words, which occur only in section 6 (7) of that Act in connexion with the provision of particular solicitors for legally aided persons, do not affect the present matter in any way: see the definitions of "matrimonial "cause," "action," "cause" and "matter" in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 225.

[Lloyd-Jacob J. The judge said that because of the words "in connexion with" in the definition of "matrimonial cause" in section 17 (1) of the Legal Aid and Advice Act, 1949, that definition went beyond the definition of the same words in the Judicature Act, 1925.]

Yes.

[Denning L.J. But the words "matrimonial cause" do not appear in regulation 17 (1) (*a*) at all. It is in general terms and does not distinguish "matrimonial causes" from any other cause.]

There cannot be any such distinction. The regulations say that an assisted person is liable for costs, but the court must assess the amount at one stage only.

[Lloyd-Jacob J. Then the provisions would be different for assisted persons and other persons?]

[Denning L.J. Of course the whole basis of assessment of costs is different in legally aided cases. One does not go into the means of unassisted persons.]

Stephen Stewart for the wife. Karminski J. thought that the application was utterly misconceived and decided that this sort of application ought not to be made. Where litigants are assisted an assessment made at the conclusion of the proceedings takes into account how much the assisted litigant can and ought reasonably to be made to pay; that is usually a small fraction of the real costs. If no assessment can be made at the interlocutory stage, and the assisted litigant who has made a frivolous application cannot be made to pay forthwith, these costs would be merged in the vast sea of unpaid costs. It is submitted that if prima facie the words of the section support it, the regulations should be given the interpretation which will enable a judge to penalize a vexatious application in costs, even though the application is made under the Legal Aid and Advice Act, whether it is made in the Queen's Bench Division or the Probate Division. If the amount of the assessment is small enough it might deter future applications.

[Denning L.J. Nothing deters an assisted person!]

This regulation is wide enough to be interpreted so as to give the judge the same power which he has in ordinary cases.

[Hodson L.J. But taking the regulations as a whole it is clear that there must be an elaborate investigation as to means in each case.]

On the material regulation, regulation 17 (1) (*a*), if the appellant's submission is right, the words "or hearing" would be superfluous because the assessment would be made at the trial of the matter.

[Denning L.J. In an ordinary application in the Queen's Bench Division the meaning of "trial or hearing of the action" does not mean every preliminary application.]

Any interlocutory matter is a "hearing" and comes within regulation 17 (1) (*a*). Alternatively, it is submitted that this is a "cause." These are divorce proceedings, and a "matrimonial "cause" begins with the filing of a petition. If this application can be shown to be "in connexion with a matrimonial cause," that is sufficient for the assessment to be made. The regulation does not say "at the end of" but only "at the trial or "hearing."

[Hodson L.J. It sounds like once for all.]

The spirit of the whole Act requires that the litigant is to be made liable in costs if his conduct is such that the court considers he ought to contribute. It would require more specific regulations than something that sounded like "once for all" to shut the judge out of making the ordinary order at an early stage. If this is not a hearing of a cause, it must be the hearing of a "matter."

[Lloyd-Jacob J. You agree that the definition of "matter" must be that in the Judicature Act, 1925, and you say that that would include any proceedings in a matrimonial cause?]

Yes, because "matrimonial cause" is here defined as meaning "proceedings in . . . the Supreme Court in or in connexion with a "matrimonial cause or matter within the meaning of the Supreme "Court of Judicature (Consolidation) Act, 1925." That definition caused Karminski J. to look at the Act of 1925 to consider the definition there. The definition in the Act of 1949 is very narrow but it is sufficient for the purpose here. All that I need establish is that the application was made " in connexion with " an action for divorce, which it certainly was. The judge said he did not rely on the definition in the Judicature Act, because the definition in the Legal Aid Act of 1949 was wide enough to justify his judgment: see *per* Lord Selborne L.C. in *Green* v. *Lord Penzance*,[5] the locus classicus defining " cause "—a wide definition but one which has always been relied on. If this is not a cause, it is a matter, which is neither an action nor a cause.

[DENNING L.J. But it must be a " cause " or " matter " within the meaning of the Judicature Act definitions. You could not argue that any interlocutory application, e.g., fixing a date, was the trial or hearing. The trial or hearing is the occasion when the parties are present and the judge decides. A further difficulty is that the word " shall " in regulation 17 (1) (*a*) is imperative, and would mean that if you are right the assessment of costs must be made on every interlocutory application.]

It is submitted that an order should be made against the appellant for a specific amount because of his particular conduct on one application which the trial judge has not heard. The conduct must be considered on the assessment.

[DENNING L.J. I don't see why a report could not be made to the judge.]

There is another aspect to be considered. If the husband is successful in this case, how will the unsuccessful petitioner put into effect an order for costs on the application where both sides are legally assisted?

[LLOYD-JACOB J. Notionally one sets them off.]

[DENNING L.J. The order for costs is one thing, but the determination of the amount is another.]

This is a particular order for costs to be paid by the litigant in person forthwith. It is undesirable that the power should be taken from the judge in legally assisted cases, in view of the frequent criticism of the different procedure adopted in legally assisted cases. The way of bringing home to such persons the necessity of avoiding frivolous or vexatious applications is the use of the power given by section 2 (2) (*e*) of the Act. The regulation ought therefore to be construed by saying that though this is not a " matter " the hearing is in a cause, and the amount of costs can thus be assessed on the application.

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[5] (1881) 6 App.Cas. 657, 671.

DENNING L.J stated the facts and continued: The question is whether the judge had power to make that order having regard to the fact that the husband was a legally assisted person. The matter depends entirely on the interpretation of the Legal Aid and Advice Act, 1949, and the regulations made thereunder. Section 2 (2) (*e*) contemplates that an order for costs can be made against an assisted person, but it draws a distinction between an order for costs on the one hand and the amount which has to be paid on the other. The amount has to be determined in accordance with the regulations; and regulation 17 (1) says specifically: "Where an order for costs is made against an assisted person, "then . . . (*a*) the determination of the amount of his liability "for costs in accordance with section 2 (2) (*e*) of the Act shall ". . . be made at the trial or hearing of the action, cause or "matter and be final." I see no point whatever in the words "at the trial or hearing" unless they mean the final determination of the matter. They do not include preliminary applications. They do not include the application for attachment in this case. The judge had therefore no power to assess the sum at £10 as he did.

Karminski J. was impressed by the definition section of the Act, section 17, which defines a "matrimonial cause" as meaning "proceedings in the House of Lords or the Supreme Court in or "in connexion with a matrimonial cause or matter within the "meaning of the Supreme Court of Judicature (Consolidation) "Act, 1925." He thought that the words "in connexion with "a matrimonial cause or matter" gave him the jurisdiction which was asked of him. In my judgment, that is erroneous, because the words "matrimonial cause" in that definition only have application to one section of the Act, section 6 (7). They have no application to regulation 17 (1), which does not refer to "matrimonial cause" at all. The power to determine the amount of costs under regulation 17 is the same in the case of a matrimonial cause, a Queen's Bench action, or a Chancery matter. Matrimonial causes do not stand in a class by themselves in this respect. If regulation 17 gave the power to assess the costs on any interlocutory application, it would mean that the master or judge would be bound to determine the amount of the costs. The word in the regulation is imperative—"shall." All the machinery of inquiry which is provided by the regulations, such as the machinery in regulation 15, would have to be put in motion to determine the amount. It would be most inconvenient that, on every interlocutory proceeding, an inquiry of that kind should have to be made.

It seems to me plain that the intention of the regulation was that, while orders for costs can be made in interlocutory proceedings, nevertheless the amount payable cannot be determined until the trial or hearing. It comes to this. As against a legally assisted person, a master or judge cannot order the costs to be taxed and paid forthwith as he can against any other litigant. All that he can do is to make an order for costs in any event, or for costs in the cause, or any variant of those orders. He cannot determine the amount of the costs on interlocutory proceedings. That can only be done at the trial or hearing of the action, cause or matter.

The only way in which the judge can express immediately his disapproval of the application is, in a proper case, to say that the solicitor for the legally assisted person, who took out the misconceived application, should not have his costs against the fund. He can make an order against the party to pay the costs in any event, but he cannot assess the amount.

For these reasons, in my judgment, this appeal should be allowed. The order of Karminski J. should be varied by striking out the assessment of £10 and by ordering the husband to pay the costs in any event.

HODSON L.J. I agree. I think that the language of regulation 17 (1) (*a*) is clear, and I have little to add to what my Lord has said. I think that Mr. Stewart, who sought to uphold the judgment of Karminski J., was driven in the end to the argument ab inconvenienti, because he said that, if the judge's decision were wrong, the judge in all these cases is deprived of the power of making an order for costs in interlocutory matters such as he could have made against a litigant in ordinary litigation, and that that was an undesirable result, because the power of the court to make an order for immediate taxation and payment of costs in respect of a misconceived interlocutory application is a valuable sanction, and a protection for a party who does not want to embark on litigation on a wasteful and expensive basis. It may be unfortunate that that is so; but, in my judgment, that is no reason for departing from the plain words of the regulation, which involve that the assessment of liability for costs must take place

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once and for all at the trial or hearing of the action, cause or matter. That point has not been reached in this case.

LLOYD-JACOB J. I agree.

Appeal allowed. Order varied by setting aside assessment of £10. Application for writ of attachment dismissed with costs in any event.

Solicitors: *George & George; W. B. Blackwell & Co.*

M. M. H.

1952
Dec. 3.
1953
Mar. 16.

Collingwood J.

J. (ORSE. B.) (BY HER NEXT FRIEND) *v.* J.

Divorce—Nullity—Presentation of petition by next friend—Alleged insanity of petitioner—Application to dismiss petition supported by petitioner.

A petition for nullity of marriage on the ground that the wife petitioner had not had the capacity to marry by reason of her insanity was presented by the petitioner's niece acting as her next friend. The respondent husband entered an appearance under protest on the ground that the petitioner was not of unsound mind nor suffering from any incapacity which necessitated, or justified, the proceedings being brought by the next friend, and he sought to have the petition dismissed. The petitioner supported the respondent's application in an affidavit:—

Held, that the respondent was entitled to have the suit dismissed if it could be shown that there was reasonable ground for supposing that the petitioner was capable of managing her own affairs.

SUMMONS (adjourned into court for judgment).

A petition for nullity of marriage on the ground that the petitioner (the wife) was alleged not to have had the capacity to marry by reason of her insanity, or in the alternative that the petitioner was alleged to have been of unsound mind at the time of the marriage, was presented by her next friend, K. E. F. K., on June 9, 1952. On July 24, 1952, a summons was taken out before the registrar for leave to amend the appearance on the respondent husband's behalf to an appearance under protest on the ground that the wife was not a person of unsound mind nor suffering from any incapacity which necessitated or justified the proceedings being brought by K. E. F. K. as next friend. No order was made on that summons save that the cause be stayed pending an application for directions under rule 27 of the Matrimonial Causes Rules, 1950.[1]

The matter came before the judge in chambers on July 30, 1952, on an application to stay or, alternatively, to dismiss the cause upon the same ground. The judge accepted the submission that rule 27 did not apply to the question in issue, namely, the wife's sanity at the date of the institution of proceedings. Application was accordingly made for the proceedings to be stayed or dismissed as being an abuse of the process of the court.

The matter came before the judge again on November 3, 1952, after an adjournment, and affidavits were read on behalf of the husband. Those affidavits included one to the wife herself (who was aged about 80 and considerably older than the husband), who stated that she had never requested the next friend or any other person to take proceedings to annul the marriage, that she did not wish the marriage annulled, and that the proceedings had caused her anxiety and distress. She further stated that she had married to protect herself from the unwelcome visits of her relatives, which, she considered, were paid for the purpose of obtaining information as to her estate. Affidavits by the husband and his mother to the same effect were also filed, and there were two affidavits by medical practitioners stating that the wife was a person of sound mind, and in no sense a mental defective, and an affidavit by her solicitor as to interviews with her which satisfied him as to her mental capacity.

Anthony Harmsworth for the husband.
John Syms for the next friend.
(Argument was heard in chambers.)

Cur. adv. vult.

Collingwood J., reading his reserved judgment, stated the facts and continued:—It was contended by counsel for the wife (who admitted that he was really appearing in the interests of the next friend) that all that was necessary to entitle a person to institute proceedings such as the present suit in the capacity of next friend was to show a sufficient interest, and that as the next friend in the present case was the wife's niece and had a pecuniary interest, that concluded the matter.

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[1] Matrimonial Causes Rules, 1950, r. 27: "An application for directions "for the separate trial of any issue "or, except in a case to which rule "14 (2) [Appearances under protest] "applies, of any question as to the "jurisdiction of the court shall be "made to a judge."

In support of that contention I was referred to *Ray* v. *Sherwood and Ray*.[2] In that case it was held that a father qua father had sufficient interest to enable him to bring a suit in the ecclesiastical court, in what was known as the civil form, for the purpose of annulling the marriage of his daughter as being void on the ground of consanguinity. But the father in that case was not acting in the capacity of guardian or next friend. The daughter was of age, and the father was himself the petitioner in his own right, and his title to sustain the suit lay in his having a pecuniary interest owing to his possible liability under the Poor Relief Act, 1601, to maintain the issue of the marriage.

In the present case the petition is that of the petitioner herself, and the issue before me is the authority of the next friend to institute proceedings. It was contended on behalf of the husband that he had a right to put a summary end to the proceedings if no such authority existed. In my opinion, the authorities make it clear that he has such a right.

In *Turner* v. *Meyers*,[3] which was a suit to annul a marriage on the ground of insanity, the proceedings were first brought by the husband's father. To this it was objected on the part of the wife that the father had no right to bring such a suit, the son being of age and sui juris, unless appointed committee of his person. The court held that the suit was brought by the father to annul the marriage of a party of competent age, without setting up any special interest, but averring the insanity of the son at the time. The only question was whether the person before the court was the proper person to plead it. It was not alleged that the son was insane at the institution of the suit, and he must be presumed sane, and as such capable of bringing suits proprio jure. No one could be attorney or procurator for him but by his own appointment, and in fact the husband had taken no steps to annul the marriage, but rather adhered to it. It was held that therefore the father had not a persona standi before the court, and his suit was dismissed.

In *Fry* v. *Fry*[4] the facts were that the parties were married in June, 1889; in November of that year a son of the wife by a

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[2] (1836) 1 Curt. 173, 193.

[3] (1808) 1 Hagg.Con. 414.

[4] (1889) 15 P.D. 25.

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former marriage obtained from the registrar an order under what was then rule 196 assigning him to be his mother's guardian ad litem for the purpose of promoting a suit declaring her marriage with the respondent to be void on the ground that she was insane at the time of its being solemnized. Counsel on behalf of the wife moved to rescind that order, adducing evidence to show that she was of sound mind. Butt J. discharged the order, holding that an order under the rule assigning a guardian ad litem to a person alleged to be of unsound mind should not be made where there was a bona fide and substantial dispute as to the insanity of the party.

That order was appealed from.[5] In his judgment Cotton L.J. said [6]: " This is an appeal from an order of Butt, J., discharging " an ex parte order of the registrar assigning a guardian ad litem " to a person alleged to be of unsound mind. I will not give any " opinion on the question whether, on the evidence before us, she " was of unsound mind at the date of her marriage, or whether " she is so now, for I go upon this ground, that an order ought " not to be made under rule 196 for assigning a guardian ad litem " where there is a bona fide dispute whether at the time of the " application the party is of unsound mind. The question is " whether the court shall give to some other person the conduct " of a suit, on the ground that this lady is incapable of acting for " herself, and I think the court ought not to do so where there " is a bona fide dispute whether she is not capable of acting for " herself. I do not at present feel disposed to assent to the view " of Lopes, L.J., that this rule only applies to the case of a person " found lunatic by inquisition. The rule applies equally to a " party suing and to a party defending, and it would be very " serious to hold that, if a person of unsound mind is sued, no " defence can be put in till he has been found lunatic by inquisi- " tion; but, where there is a bona fide dispute as to the sanity " of the party, I think that an order for a guardian ad litem ought " not to be made. The medical evidence adduced in support of " the application to discharge the registrar's order shews that " there is reasonable ground for contending that this lady is " capable of managing her own affairs. I think, therefore, that " the appeal must be dismissed, not on the ground that the " registrar was wrong in making the order on the materials before " him, but on the ground that the evidence adduced before the " judge shewed that the case was not one in which such an order " ought to have been made."

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[5] (1890) 15 P.D. 50.

[6] Ibid. 51.

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Lindley L.J. gave judgment to the same effect, and after stating shortly the facts he went on to say[7]: "It would be "monstrous if a self-appointed guardian was allowed to go on "with such a suit when a defence like that is made. The son "may apply for an inquisition, and if she is found lunatic by "inquisition the committee can sue, and if no committee is "appointed a suit may be promoted by a guardian ad litem."

Lopes L.J., at the end of his judgment, said[8]: "As regards "the other point, assuming the rule to apply to the case, I agree "with the Lords Justices that the power given by it ought not "to be exercised where there is a bona fide dispute as to "sanity."

The question arose in a different form in *Richmond* v. *Branson & Son*.[9] That was an action by a plaintiff described as "of "unsound mind not so found," by her next friend against a firm of solicitors for delivery up of certain deeds and documents of title deposited by her with them as her solicitors, it being alleged that she was, and had for many years been, insane. By their defence the defendants admitted possession of the documents, but pleaded that she was not at any material time a person of unsound mind. On a motion by the plaintiff to strike out so much of the defence as did not admit the unsoundness of mind of the plaintiff, and for judgment on the admissions in the defence, Warrington J. held that the defendants by raising the issue as to unsoundness of mind were in effect denying the authority of the plaintiff's solicitors to bring the action, and that was not an issue which it was competent to them to raise at the trial of the action. The important part of the judgment, so far as the present question is concerned, is where Warrington J. said[10]: "If there were nothing "else, the plaintiff would, in my opinion, upon these admissions, "plainly be entitled to judgment against the defendants for "delivery up of those documents to the person she indicates as "the person to receive them. The defendants, however, set "up, or attempt to set up, as an issue in the action the question "whether or not the plaintiff is in fact of unsound mind. In other "words, they dispute the authority of the solicitors instructed by "the next friend, and that of the next friend himself, to institute "the action. Now is that an issue which it is competent to the "defendants to raise at the trial? In my opinion it is not. The "action, in whatever form it is brought, is the action of the

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[7] Ibid. 52.

[8] Ibid. 53.

[9] [1914] 1 Ch. 968.

[10] Ibid. 973.

"plaintiff. If a solicitor is acting without authority in an action "brought by a plaintiff who is not alleged to be of unsound mind, "either the plaintiff or the defendant is entitled to have that "action summarily stayed, and to an order that the solicitor "should pay the costs of the action as between solicitor and "client. There is really, in principle, no distinction between an "action brought by a plaintiff of unsound mind, or alleged to be "of unsound mind, by her next friend, and an action brought by "an ordinary plaintiff. In both cases the real question, if there "is any question at all, is that of the authority of the solicitor. "Of course, in the case of a person suing by a next friend there "is the further question of the authority of the next friend, and "in those cases it is competent either to the plaintiff himself, "that is to say the person who is assumed to be non compos "mentis or not sui juris, or to the defendants to put a summary "end to the proceedings, and, in the case of a next friend, he "also would be subject to an order to pay the costs."

In my opinion, therefore, the husband is entitled to have the suit dismissed if it can be shown that there is reasonable ground for supposing that the wife is capable of managing her own affairs. At the present moment the evidence as to this is all one way, but I was informed that the legal advisers of the wife's next friend were under a misapprehension as to the necessity of bringing evidence at the adjourned hearing, and I will therefore afford them an opportunity of filing affidavits in answer to those which have been filed on behalf of the respondent.

Syms for the next friend later stated that on further consideration he did not propose to file any evidence. As, therefore, the only evidence before the court was to the effect that the wife was capable of managing her own affairs, his Lordship dismissed the petition.

Petition dismissed.

Solicitors: *Long & Gardiner, for Norman F. Steward, Wolverhampton; Donald, Darlington & Nice.*

J. B. G.

1953
Mar. 4.

Davies J.

WORBOYS *v.* WORBOYS.

Husband and Wife—Divorce—Practice—Service—Order for security—Power to direct substituted service of order—R.S.C., Ord. 67, *r.* 6—*Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940) (*L.*27), *rr.* 62 (2), 80.

The court has power in a matrimonial cause to direct substituted service upon a husband of an order to pay into court or give security for his wife's costs notwithstanding the provision in rule 62 (2) of the Matrimonial Causes Rules, 1950, for personal service of such an order, which is enforceable by attachment if not complied with.

A wife petitioner, who had previously experienced difficulty in obtaining from her husband an acknowledgment of service of her petition (to which no appearance was entered) was granted an order for security for her costs in the sum of £50. Personal service of the order for security could not, however, be effected, although there was evidence of circumstances which satisfied the court that the husband was aware of the order and was seeking to evade service. On an application for leave to serve the order by substituted service:—

Held, that the provisions for substituted or other service in R.S.C., Ord. 67, r. 6, were not rendered inapplicable by those for personal service in rule 62 (2) of the Matrimonial Causes Rules, 1950, and that in the circumstances this was a proper case for an order for substituted service to be made.

Per curiam: It has been the practice of all Divisions of the court for very many years in appropriate cases, and where the facts justified it, to give leave for substituted service not merely of orders such as the present one on which attachments may issue, but of the motion for attachment itself.

SUMMONS (adjourned into court).

The following statement of facts is taken from the judgment: By her petition dated July 31, 1952, and filed on August 11, 1952, a wife claimed dissolution of marriage on the ground of adultery with a named woman. It was stated in the petition (and found as a fact by the court) that the respondent was living at 122 St. George's Avenue, Tufnell Park. On August 11, 1952, the petition together with the appropriate other documents was sent by registered post to the respondent at that address in accordance with the rules. No acknowledgment was received, and on September 2, 1952, a further letter was sent to the respondent at the same address asking for the acknowledgment of service. No reply was received to that letter. On September 10, 1952, one Bowman, a clerk in the employ of the petitioner's solicitors who was in charge of the case, called at 122 St. George's Avenue in the afternoon and saw a lady who

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said that she was the respondent's mother. She said that the respondent was not at home but would be back at 6 o'clock in the evening. Bowman said that he would call back at 7 o'clock. At 7 o'clock he called back and was told by the same lady that the respondent was not at home but that he had in fact received the petition and the accompanying documents. Bowman then asked whether she would ask the respondent to post the acknowledgment of service. As a result, the acknowledgment of service was duly received, purporting to be signed by the respondent and dated September 9, 1952, acknowledging that on August 12, 1952, he (the respondent) had received the petition, the notice of petition and the memorandum of appearance. (The court found as a fact that the respondent received the documents although he had been dilatory in acknowledging them.)

On October 22, 1952, Mr. Registrar Compton Miller made an order for security for costs in the sum of £50. On October 31, 1952, a copy of that order which, on its face, stated that it had to be complied with in 28 days, was posted to the respondent at the same address by the petitioner's solicitors. As no reply or other acknowledgment was received, Bowman again attended at 122 St. George's Avenue on November 21, 1952, saw the respondent's mother, and said that he would like to get in touch with the respondent. The respondent's mother said that he was out. Bowman told her why he had come, and she then said that if he, Bowman, would leave his telephone number she would arrange for the respondent to get in touch with him on the telephone to make an appointment at which this order might be served. Bowman left her his telephone number but nothing happened. On the following day Bowman called again and after another conversation with the mother said that he would call again on November 24, 1952, at 7.30 p.m. He did so, and on that occasion the respondent's mother said that the respondent had had the message but was not in the house. There were one or two subsequent conversations between the petitioner and the respondent on the telephone in one of which the respondent said: "You are not going to get £50 out "of me for costs."

The order was never in fact served on the respondent, and on January 8, 1953, application was made for leave to serve this order by substituted service. The summons was adjourned by Sir Horace Pereira, the Senior Registrar, to the judge.

Campbell Lloyd-Davies for the wife. Although rule 62 (2) of the Matrimonial Causes Rules, 1950,[1] states that such an order as the present one should be served personally, it is submitted that when personal service has failed, because the person on whom the order is made is deliberately evading personal service, substituted service is not excluded. If it were, a person by evading personal service could permanently flout the order of the court. The textbooks on divorce agree that there is no order which cannot in a proper case be served by substituted service.

The Matrimonial Causes Rules, 1950, specifically provide for substituted service in certain cases, as in rule 9 (3) in the case of a petition, but there is no rule dealing generally with substituted service. Rule 80[2] is, in my submission, applicable to all divorce matters and is not excluded from application to matters coming within rule 62 (2). One is therefore entitled to look at the Rules of the Supreme Court in deciding whether the court has power to make an order for substituted service of an order requiring a person to do any act, such as in this case to pay money into court as security. R.S.C., Ord. 67, r. 6,[3] deals with substituted service and would seem to apply to all orders of the court where prompt personal service cannot be effected. It is submitted that substituted service can be ordered even though the rules specifically provide for personal service and although failure to comply with the order may entail attachment of the person or his goods; certainly in a case where the stipulated personal service has failed because there has been a successful evasion of such service. It is submitted that even a notice of motion to commit may be served by substituted service where personal service is being evaded: *Mander* v. *Falcke.*[4] [The following cases where substituted service had been ordered were referred to: *Nuttall* v. *Nuttall*[5]; *Pritchard* v. *Pritchard and Bean*[6]; *Whyte-Melville* v. *Whyte-Melville*[7]; *In re a Solicitor.*[8]]

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[1] Matrimonial Causes Rules, 1950, r. 62 (2): "A decree or order requiring a person to do an act thereby "ordered shall state the time within "which the act is to be done, and the "copy to be served upon the person "required to obey the same shall be "endorsed with a notice in accordance "with Form 20 [' Take notice that if "' you the within-named A.B. neglect "' to obey this decree (or order) within "' the time therein limited you will "' be liable to process of execution "' for the purpose of compelling you "' to obey the same '] and shall be "served personally on that person "(the original decree or order or a "copy issued by the court being pro- "duced to him at the time of service) "or shall be delivered to his solicitor."

[2] Matrimonial Causes Rules, 1950, r. 80: "Subject to the provisions of "these rules and of any enactment, "the Rules of the Supreme Court "shall, notwithstanding the provisions "of Order 68 thereof, apply with the "necessary modifications to the prac- "tice and procedure in any cause or "matter to which these rules apply."

[3] R.S.C., Ord. 67, r. 6: "Where "personal service of any . . . order ". . . is required by these rules or "otherwise and it is made to appear "to the court or a judge that prompt "personal service cannot be effected, "the court or a judge may make such "order for substituted or other service, "or for the substitution of notice for "service by letter, public advertise- "ment, or otherwise, as may be just."

In the present case the respondent is evading service of the order for security. The method of substituted service asked for is likely to bring the order to the husband's notice. In the circumstances I submit that the order should be made and that the court has an inherent power to take all such steps within the Rules of the Supreme Court as may ensure that its orders are not evaded or flouted.

The husband did not appear and was not represented.

DAVIES J. This is a reference from the registry to me of a not uninteresting question which has arisen in connexion with the service upon a respondent of an order to pay into court or give security for the costs of his petitioning wife. The question is whether there is power to direct substituted service of such an order. The matter was before me in chambers on February 26, 1953, when Mr. Lloyd-Davies appeared for the petitioning wife. The husband was not represented and did not appear, and, after full argument by counsel for the wife, I adjourned the matter into court.

[His Lordship stated the facts and continued:] The difficulty, as I understand it, which the registry felt was that under rule 62 (2) of the Matrimonial Causes Rules, 1950, " A decree " or order requiring a person to do an act thereby ordered shall " state the time within which the act is to be done, and the " copy to be served upon the person required to obey the same " shall be endorsed with a notice "—that is the penal notice— " . . . and shall be served personally on that person (the original " decree or order or a copy issued by the court being produced " to him at the time of service) or shall be delivered to his " solicitor."

The material words which troubled the registry were " and " shall be served personally on that person." The view was taken that as that rule requires in its terms personal service, and that as such an order, if not complied with, is enforceable by attachment, personal service is necessary, and that there is no power in any circumstances to order substituted service of such an order.

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[4] [1891] 3 Ch. 488.
[5] (1862) 31 L.J.P.M. & A. 164.
[6] (1870) L.R. 2 P. & M. 53.
[7] (1888) 4 T.L.R. 491.
[8] [1892] W.N. 22.

That was the view which the registry took. Despite the general words of rule 80 of the Matrimonial Causes Rules, 1950, which provides that "subject to the provisions of these rules "and of any enactment, the Rules of the Supreme Court shall, "notwithstanding the provisions of Order LXVIII thereof, apply "with the necessary modifications to the practice and procedure "in any cause or matter to which these rules apply," the registry considered that it was impossible under rule 80 to import the provisions of R.S.C., Ord. 67, r. 6: for it was thought that R.S.C., Ord. 67, r. 6 was in conflict with the express words of rule 62 (2) of the Matrimonial Causes Rules, 1950.

I do not think that it is. I think that this case is a reasonably plain and simple one. But as it has caused trouble in the registry and as the authorities were gone into before me, I think it is right that I should refer to the rules and to the authorities cited. The reason why I think the case a simple one is that in my judgment, it is precisely covered by the words of R.S.C., Ord. 67, r. 6. Rule 62 (2) of the Matrimonial Causes Rules, 1950, provides that there shall be personal service. R.S.C., Ord. 67, r. 6 provides as follows: "Where personal service of "any . . . order . . . is required by these rules or otherwise "and it is made to appear to the court or a judge that prompt "personal service cannot be effected, the court or a judge may "make such order for substituted or other service, or for the "substitution of notice for service by letter, public advertisement, or otherwise, as may be just." I think that that rule covers this case and I so hold.

Without going in too great detail into the rules, it is pertinent to remark that the requirements of personal service under rule 62 (2) was introduced for the first time by the Matrimonial Causes Rules of 1947. In the Matrimonial Causes Rules, 1937, rule 8 (1) dealt with service of petitions, originating summonses and notice of application for ancillary relief. Rule 11 (1) and (2) dealt with service of other documents. Rule 11 (1) provided: "Service of any document on a party who has not entered "an appearance shall be personal service, unless otherwise "directed . . ." Rule 11 (2) provided: "Any notice or other "document by these rules required to be served but of which "personal service is not required, may be served by leaving the "same at the address for service . . ." Rule 62 (2), which was not in exactly the same words as the present rule 62 (2), was silent as to whether or not the service of such an order should be personal.

Those rules were followed by the rules of 1944, which differed in form, though the substance was precisely the same. It is right that I should point out that in at any rate one of the textbooks which were current when those rules were in force, namely, the fourth edition of Rayden on Divorce, it is stated in Chapter 6, s. 11, para. 10, at p. 261, under "Attachment": "Application "for a writ of attachment (which cannot issue without an order) "must be made to a judge on summons, which is adjourned into "open court. It is necessary that the order on which the application is founded should have been personally served on the "party, indorsed with the penal notice as required by divorce "rule 62 (2), unless leave to substitute some other form of "service has been obtained." The editors therefore regarded substituted service as possible, though no authority was cited for the proposition. It is curious to note that in the next edition of Rayden, at p. 294, the word "necessary" becomes "advisable." I do not know the reason for that change.

Rule 8 (1) of the Matrimonial Causes Rules, 1947, dealt, as before, with service of petition, originating summons and notice of application for ancillary relief. But that was the rule which first introduced service by registered post for such documents; previously personal service was necessary. Rule 11 (1) and (2) permitted service by post of other documents. But when we come to rule 62 (2),[1] which dealt with orders such as the one with which we are at present concerned, we find that service had to be personal or upon the party's solicitor. The present rules of 1950 are to the same effect.

That is how the rules stand. In addition to the rules my attention was called to the three leading textbooks. I do not propose to quote them in extenso but it is right to say that in the current editions of those textbooks, without any specific reference in any of them, so far as I have been able to ascertain, to the change which was made in the wording of this rule in 1947, the view is expressed that substituted service may be ordered in such a case as the present. The references are: Rayden on Divorce, 5th ed., pp. 233 and 294; Phillips' Divorce

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[1] As amended by S.R. & O., 1947, No. 1757/L.21, para. 11.

Practice, 4th ed., pp. 286 and 287; and p. 631 of the latest book in date of them all, Mr. Latey's book (Latey on Divorce, 14th ed.), where the proposition appears in this form: "It would seem "that there is no pleading, order, decree or other document, "which, where the circumstances justify such an order being "made, may not be served by some form of substituted service." So the textbook writers are in agreement.

But the matter does not stop there. On the authorities that were cited to me I am quite satisfied that for very many years it has been the practice of all Divisions of this Court, in appropriate cases and where the facts justified it, to give leave for substituted service not merely of orders such as these on which attachments may issue, but of the motion for attachment itself.

It is not necessary to refer to a great number of cases, and most of the relevant reports are fairly short. The first case to which I was referred was *Nuttall* v. *Nuttall*,[2] a case in this Division where an order had been made that a husband should pay costs and alimony pendente lite to his wife. The husband, in order to avoid compliance with that order, had assigned his property and could not be found. The court made an order for substituted service of the orders by leaving them at the last known residence of the husband, at his attorney's office and at the address given in the appearance book (that is, what we nowadays call the address for service). Those orders were enforceable by attachment and, though not exactly the same as the order in the present case, were indistinguishable from the present one in all essentials for the purposes of the present discussion.

Nuttall v. *Nuttall*[2] was decided in 1862. In *Pritchard* v. *Pritchard and Bean*,[3] decided in 1870, there had been an order for damages against the co-respondent and in order to enforce it an order had been made that the damages should be paid to the petitioner. On it being made clear to the court that the co-respondent was moving his property away and that there was reason to believe that it was his intention to remove his personal property from the jurisdiction of the court in order to defeat the claim of the petitioner, an order was made that the damages should be paid to the petitioner within two days, and it was further ordered that in the event of the damages not being so paid, a writ of fi. fa. should be issued forthwith. Three days later, counsel applied to the court to order a writ of fi. fa. to

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[2] 31 L.J.P.M. & A. 164.

[3] L.R. 2 P. & M. 53.

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issue at once, without personal service of the previous order for the payment of the damages upon the co-respondent. He read an affidavit to the effect that the co-respondent was keeping out of the way to avoid such service and that notice of the order had been given to his wife, brother and solicitor. The judge granted the application.

I need not pause to consider whether a precisely similar order to that would be made at the present time. In that case there was no sort of service of the order upon the co-respondent at all. But the case shows that the court is prepared to act drastically if there is evidence that the party to whom the order is issued is seeking to disobey or not to comply with orders of the court. So much for cases in this Division.

My attention was also called to *Whyte-Melville* v. *Whyte-Melville*.[4] That was a case in which an order had been made upon a reverend gentleman directing him within four days of the service of the order to deliver up to a receiver certain securities. It was impossible to serve the defendant with this order, and the plaintiff obtained an order directing that service upon the defendant's solicitor should be deemed good service; in other words, an order for substituted service. The defendant did not comply with the order, and an application for a writ of attachment against him was made to, and granted by, Stirling J., who said in the course of his judgment,[5] after referring to R.S.C., Ord. 67, r. 6: "The theory upon which that power was given to the court "was that if the court found that the person to be served was in "communication with a person within the jurisdiction of the "court, and there was a reasonable probability that substituted "service of the order would have the result of its reaching the "person upon whom it was made, the court would act upon that "presumption."

That judgment, as I have said, was on an application for attachment. In the Chancery Division in 1892, in *In re A Solicitor*,[6] North J. gave leave for substituted service of a notice of motion to commit.

There are only three other authorities to which I need refer in order to illustrate the principle. The principle, of course, is this, that it would be absurd to suppose that a party to litigation in whatever Division of this court could stultify the court's order and permanently disobey such an order by keeping out of the way and evading personal service. That principle was well stated, if I may respectfully say so, by Kekewich J. in *Mander* v. *Falcke*[7]: "In another case before me, an order for committal was made "and was upheld by the Court of Appeal, notwithstanding the "absence of personal service of the notice of motion. When the "application comes before me in this case to dispense with "personal service, I will consider it." He is not saying, I have not got power to do it. "Such an application must "necessarily be ex parte, and I shall not have the advantage of "Mr. Oswald's assistance. I will not prejudge such an application one way or the other, except so far as to say"—and this is the part which I think is important and illustrates the common sense of the rule—"that it would be impossible and "inconceivable, and contrary to common sense and justice, that "a man who has rendered himself liable to committal should "ultimately be able to evade it by keeping out of the way."

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[4] 4 T.L.R. 491.

[5] Ibid. 492.

[6] [1892] W.N. 22.

Two other short quotations may be made from two cases in the Court of Appeal. The first is *Kistler* v. *Tettmar*.[8] I need not go in any great detail through the facts of that case. Although made in the Court of Appeal, some observations in that case were rather doubted in the other case to which I shall refer which was also in the Court of Appeal. In *Kistler* v. *Tettmar*[8] an order had been made for a judgment debtor to attend and to be examined as to her means. It had been impossible to effect personal service of that order upon her and it was sought to attach her for non-compliance with the order. Stirling L.J. said[9]: "The general rule always has been that a writ of "sequestration cannot be issued unless the party applying for it "is in a position to obtain a writ of attachment. This being the "law, the only remaining question to be considered is one of "fact, namely, whether the judge was right in coming to the "conclusion that the judgment debtor was evading service of "the order. It seems to me that he was. It may be that, "instead of leaving the copy order with the husband of the "judgment debtor, as the process-server did, the better course "would have been to apply for an order for substituted "service, which might in my opinion have been made under "Order LXVII, r. 6." That is a clear statement by Stirling L.J. as to the power of the court. The point that Kekewich J. referred to in the last cited case is reiterated by Mathew L.J. where he says[10]: "It was argued for the judgment debtor that

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[7] [1891] 3 Ch. 488, 493.
[8] [1905] 1 K.B. 39; 21 T.L.R. 24.
[9] Ibid. 44.
[10] Ibid. 45.

"the rule requiring personal service of an order, before a writ of "attachment can be issued for disobedience of it, admitted of "no exception; and consequently that in this case no writ of "attachment could issue even although the judgment debtor "was well aware of the existence of the order, and was evading "the service of it. This is a somewhat startling proposition, for, "after all, the only object of the rule requiring personal service "is that the party should know what the order was and the "consequences of disobeying it. I do not think that there is any "authority for this proposition, which would lead to a manifest "absurdity, namely, that the court would be rendered powerless "to enforce its order if the person against whom the order was "made chose to lock himself up, and so prevent personal service "upon him."

Finally, as showing the established practice at any rate of the Chancery Division, I would refer to *In re Tuck*, *Murch* v. *Loosemore*,[11] where some doubt was thrown on one part of the decision in *Kistler* v. *Tettmar*.[12] It was held that personal service was necessary even though the order was made by consent and even though the person against whom the order was made was present in court when the order was made; but, as appears from the judgment of the court,[13] which consisted of Sir Richard Henn Collins M.R. and Cozens-Hardy L.J., they consulted the Senior Registrar as to what the practice was in the Chancery Division. The reply they received was this[13]: "The practice "in the registrar's office where an order has been made for a "person to do an act within a limited time is to require that "the order be personally served for the purposes of founding "a motion for an attachment, except in cases of orders for discovery or inspection (Ord. 31, r. 22), or where an order for "substituted service has been made (Ord. 67, r. 6), or where, "in the opinion of the court, the service has been evaded." It is plain, therefore, that at that time it was the practice of the court to make in proper cases orders for substituted service in a case such as the present.

I am convinced, therefore, that when the change in the wording of Matrimonial Causes Rule 62 (2) was made in 1947 it was never intended to depart from that long-established and most useful practice or to deprive the court of its power to make orders for substituted service in such cases.

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[11] [1906] 1 Ch. 692; 22 T.L.R. 425.

[12] [1905] 1 K.B. 39.

[13] [1906] 1 Ch. 692, 696.

The question, however, is whether, even though I am right about my view of the intention of the rule, the words which have in fact been adopted have deprived the court of its power. In my judgment, for the reasons which I have indicated earlier, they have not. Rule 62 (2) provides shortly that service shall be personal service or on the solicitor. Rule 80 provides that subject to the provisions of these rules, the Rules of the Supreme Court shall apply with the necessary modifications to the practice and procedure in any matrimonial cause or matter. It seems to me, therefore, that R.S.C., Ord. 67, r. 6 is as plain as anything can be. It says that notwithstanding the fact that the rule under consideration prescribes personal service, the court, if it is made to appear that prompt personal service cannot be effected, may make such an order for substituted or other service as may be just.

I am satisfied that that rule is not rendered inapplicable by the wording of rule 62 (2) of the Matrimonial Causes Rules, 1950; that it is imported and preserved as part of the practice of this Division by rule 80 of the Matrimonial Causes Rules, 1950; and that, therefore, I have power to make such proper and necessary order as the facts require. On the facts here I am quite satisfied that this respondent was seeking to evade service of this order; indeed, I am satisfied that he knows that the order has been made. I am further satisfied that he is living at 122 St. George's Avenue, Tufnell Park, and that communications addressed to him at that address will reach him. In all the circumstances, therefore, I think that the proper order to make here is that the service of the order of Mr. Registrar Compton Miller dated October 21, 1952, shall be effected by registered post on the respondent at 122 St. George's Avenue, Tufnell Park. As part of my order I think it right in all the circumstances that the respondent should pay the costs of the application here and before the registrar.

Order accordingly.

Solicitors: *Whitelock & Storr.*

J. B. G.

IN THE ESTATE OF LINDLEY, DECD.
LINDLEY *v.* LINDLEY.

1953
May 6.

Wallington J.

Probate—Administration pendente lite—Possibility of minority or life interest arising—Power to appoint sole administrator—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 160 (1), 163 (1).

The court has power to appoint a sole administrator pendente lite although there is the possibility of a life or minority interest arising.

PROBATE MOTION.

In this probate action application was made to the court on motion for the appointment of an accountant as sole administrator pendente lite. The issues pleaded disclosed that a minority or life interest might arise. The defendant consented to the application and the motion was supported by an affidavit of the fitness of the proposed administrator.

John Latey for the plaintiff. It has been questioned whether the court has power to appoint only one administrator pendente lite when a minority or life interest might arise, because of a statement in Tristram and Coote's Probate Practice, 19th ed., at p. 436, where it is said that two administrators must be appointed in such a case. That statement is not supported by any authority, but in *In re Price, decd.*,[1] the court held that it had power to appoint a sole administrator pendente lite even though there might be a minority or life interest. Section 163 of the Supreme Court of Judicature (Consolidation) Act, 1925,[2] deals specifically with the power of the court to appoint an administrator pendente lite, and it is submitted that the powers of the court under that section are not governed by section 160 (1)[3] of the Act.

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[1] (1931) 171 L.T.J. 251.

[2] Supreme Court of Judicature (Consolidation) Act, 1925, s. 163: "(1) Where any legal proceedings "touching the validity of the will of "a deceased person, or for obtaining, "recalling or revoking any grant, are "pending, the High Court may grant "administration of the estate of the "deceased to an administrator, who "shall have all the rights and powers "of a general administrator, other "than the right of distributing the "residue of the estate, and every "such administrator shall be subject "to the immediate control of the "court and act under its direction.

"(2) The court may, out of the "estate of the deceased, assign to an "administrator appointed under this "section such reasonable remunera"tion as the court thinks fit."

[3] Supreme Court of Judicature (Consolidation) Act, 1925, s. 160 (1): "Probate or administration shall not "be granted to more than four per"sons in respect of the same property, "and administration shall, if there

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The powers of an administrator pendente lite are limited; he is more of the nature of a receiver, and is always subject to the immediate control and under the direction of the court; he is usually a professional person as to whose fitness the court has evidence and not merely a person who happens to be one of the next-of-kin. It is submitted that these were reasons why on a reasonable construction of section 163 of the Act Parliament did not think it necessary that the safeguards provided in section 160 (1) should apply.

It was stated in the 18th ed. of Tristram and Coote's Probate Practice at p. 369 that one administrator pendente lite might be appointed " even where there is a minority or life interest."

P. R. Hollins for the defendant.

Wallington J. I am invited to appoint a professional accountant as administrator pendente lite of the real and personal estate of the deceased Edgar Ivor Lindley pursuant to the provisions of section 163 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925.

The point has been raised whether in this case there should be two administrators and not one only, by reason of the fact that there is a possibility of a life interest or a minority interest arising during the course of the proceedings, or resulting from the proceedings, in the action. I can well imagine that there may be cases of applications under section 163 (1) which may, in their circumstances, call for the appointment of a trust company or two administrators because of some special powers which the court might think it right to confer upon the administrator pendente lite, or possibly for other reasons; but in my opinion there are no such circumstances in this case.

There is a possibility, but no more than a possibility, of a life interest or minority interest arising; but no circumstances exist which, in my opinion, make it necessary for me to consider the appointment of more than one administrator. In my view, section 163 (1) is not controlled by section 160 (1) of the Act, which regulates the grant of general administration. Accordingly I appoint Mr. John William Redman of the firm of Marcus

" is a minority or if a life interest " arises under the will or intestacy, " be granted either to a trust corporation, with or without an " individual, or to not less than two " individuals: Provided that the court " in granting administration may act " on such prima facie evidence, furnished by the applicant or any other " person, as to whether or not there " is a minority or life interest, as may " be prescribed by probate rules and " orders."

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In the Estate of Lindley, decd.

Hazlewood & Co. of North Place, Cheltenham, Gloucestershire, certified accountant, as administrator pendente lite. I see that there is an affidavit of fitness and that he is willing to act as such administrator.

Order accordingly.

Solicitors: *Forsyte, Kerman & Phillips for G. Rowberry, Cheltenham; Kimber, Williams & Co. for A. V. Gregory Phelps & Co., Cheltenham.*

J. B. G.

CORBETT *v.* CORBETT.

C. A.

1953
May 1, 4.

Evershed M.R., Birkett and Romer L.JJ.

Husband and Wife — Divorce — Practice — Fresh evidence — Appeal — Application for leave to call further evidence—Principles applicable—Custody—Relevant evidence.

The general rule of the Court of Appeal laid down in *Shedden* v. *Patrick* (1869) L.R. 1 Sc. & D. 470 and followed in many cases is that, it being in the public interest that there should be an end to litigation, fresh evidence on appeal is not to be admissible unless two conditions are satisfied—namely: (1) that the new evidence was not available at the trial to the party seeking to use it, or that reasonable diligence would not have made it so available; (2) that the fresh evidence, if true, would have had, or have been likely to have had, a determining influence upon the decision of the court below.

The general rule applies in all its strictness to matrimonial cases. There may be cases of an exceptional character, from which it appears quite plainly that the court has been deceived (and in particular, has been deceived as regards a discretion statement) and that an exception should there be made to the rule which would otherwise be applicable.

The existence of the office of the Queen's Proctor prima facie covers a matrimonial case in the interests of the State. If there is evidence, albeit evidence that one party or the other could with proper diligence have produced before, and, if the Queen's Proctor is able to show that the decree was obtained upon some false evidence, he is there to protect the public interest by his intervention and to see that the process of the court is not abused. Prima facie the interests of the State will be protected in that way and for that reason, and though there may be exceptions to the general rule, they will be very rare.

Winter v. *Winter* [1942] P. 151; [1942] 2 All E.R. 390, and *Prince* v. *Prince* [1951] P. 71; [1950] 2 All E.R. 375 considered.

In proceedings relating to the custody of the children of a marriage evidence should not be excluded merely because it did not form part of the material on which the issues of divorce were determined. To exclude evidence on that ground would result in preventing the court from discharging its paramount duty in matters relating to the care and custody of the children, namely, to ascertain what directions will best serve the interests of the children. In its examination of this matter, the court is bound to inquire into all relevant circumstances; a circumstance, if otherwise material, is not to be regarded as irrelevant merely because it was not introduced into the divorce proceedings.

MOTION for leave to call further evidence on an appeal from Collingwood J.

On October 31, 1952, Collingwood J. gave judgment in a matrimonial suit in which Mr. A. J. Corbett was the petitioner and his wife, Mrs. Corbett, was the respondent, one Oskar Skribis being joined as co-respondent. The petitioner asked for a decree dissolving the marriage on the ground of the wife's adultery with the co-respondent, and the particulars of the petition specified the dates on which the alleged adultery occurred. The respondent in her answer denied the adultery, but she also claimed in the alternative that, if she did commit adultery, that adultery had been conduced to by the conduct of the petitioner, and she charged the petitioner with cruelty. She prayed in her answer for a decree in her favour dissolving the marriage on the ground of her husband's cruelty. When the matter came to be heard, she did not in fact deny that she had ever committed adultery with the co-respondent. She put before the court a discretion statement in which she conceded that, after she had left her husband, she had in fact committed adultery with the co-respondent, but she asked the court to exercise its discretion in her favour.

At the hearing of the petition and the answer the judge took a very strong view in favour of the wife as a witness of truth. He stated that he thought the husband not to be a witness deserving of credence, and said: "Both these parties have given "evidence in the box, and, having seen them give their evidence, "and particularly having seen them cross-examined, I am left "in no doubt whatever as to which of them was telling the truth. "The petitioner, the husband, gave a very bad impression indeed. "The moment he found himself in any difficulty in explaining "matters (and there were many such difficulties), he immediately "adopted an aggressive attitude towards counsel, fenced with "counsel, in an endeavour to cover up his difficulties in a spate

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"of words. The wife's evidence was far preferable. She was "a straightforward witness. She never endeavoured to indulge "in any exaggeration at all, and when one looks at the correspondence, although it is clear from it what complaints she is "making, she does not for one moment lay claim to having been "without blame herself. I accept, as I have said, the wife's "evidence wherever it differs from that of her husband."

He came to the conclusion that, though the wife (as she said in her discretion statement) had committed adultery with the co-respondent, that adultery had been conduced to by the cruel conduct of the husband. He therefore dismissed the husband's petition. Upon the wife's prayer, on the other hand, he found her case proved and, exercising the court's discretion in her favour, he granted a decree of dissolution of the marriage on the ground of the husband's cruelty. In the final passage of his judgment he said: "I am asked to say that what she has gone "through here is nothing more than the ordinary wear and tear "of married life. I should be very sorry if that were so. Accepting, as I say, implicitly the story that this woman has told me "of her treatment, I have no doubt at all that it amounted to "cruelty, that he had made life quite impossible for her in the "marital home, and I am satisfied upon the evidence that the "treatment that he meted out to her, driving her out of the "house in the end, making it incumbent upon her to find work "and a place in which to live, did conduce to her adultery. I "have already said that I accept implicitly what she has said as to "the initiation of that adultery being at a date consequent to that "when he came along and removed the little girl Ann. I think "that this is a case in which it is right that I should exercise my "discretion in her favour. The result, therefore, will be that the "prayer in the petition is rejected, and there will be a decree nisi "to the respondent in the exercise of my discretion."

The petitioner appealed against that decision. He served this notice of motion in the form usual in such cases asking that further evidence contained in certain affidavits filed on his behalf should be admitted with a view to showing that the wife's story, notwithstanding the judge's belief in it, was in material respects quite untrue. The affidavits were read by the court de bene esse.

The nature of the evidence which the petitioner sought to adduce is considered in detail in the judgment of Evershed M.R.

J. E. S. Simon Q.C. and *Daly Lewis* for the petitioner. The affidavit evidence which has been filed should be admitted. If

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it is true, it conclusively establishes the petitioner's case. The court should either hear this evidence now or send the matter back for a new trial. The general rule is that leave to call further evidence will only be granted to an appellant if he shows both that the evidence which he seeks to adduce was not obtainable by reasonable diligence at the time of the trial, and that such evidence, if then available, would have materially influenced the decision: *Shedden* v. *Patrick.*[1] The evidence which the petitioner asks leave to call falls under two heads: first, evidence directed to establishing that the wife's evidence as to her relationship with the co-respondent was untrue, and which goes to show that the judge was wrong in accepting her evidence as he did; and, secondly, evidence to establish that her discretion statement was untrue and that she had committed adultery with another man. The Queen's Proctor could intervene in a case such as this. There is here an overlapping jurisdiction. The general rule restricting the admission of further evidence on appeals should not be applied in all its strictness to matrimonial cases. That rule is based on the general principle that it is in the public interest that there should be an end to litigation, and that principle should not be applied to divorce cases which affect status and the interests of the children of the marriage. The State is concerned to see that a divorce is granted only where the circumstances are such as to entitle a party to a divorce. That the principle that litigation should not be prolonged is subject to some modification in matrimonial cases appears from the fact that the Queen's Proctor has power to intervene, and also from the fact that the doctrine of res judicata does not apply in full force in maintenance cases.

Further, it is of importance that this fresh evidence should be admitted, so that it may be available to the judge when he has to determine which of the parties is to have the custody of the child of the marriage. If leave to call this evidence is not given, it will not be available in the custody proceedings.

Lastly, it is unnecessary in a matrimonial case to show that the new evidence could have been procured by reasonable diligence at the time of the trial, if it is shown that it is material evidence. It is important to the State that a divorce should only be granted with a full knowledge of all the facts. The position is analogous to that which arises under rule 36 of the Matrimonial Causes Rules, 1950. If the petitioner had applied under rule 36 to the Divisional Court, he could have obtained an order for a new trial.

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[1] (1869) L.R. 1 Sc. & D. 470.

The evidence contained in the affidavits now filed on the petitioner's behalf establishes that the wife committed adultery and is such as to entitle the petitioner to a decree. [*Prince* v. *Prince* [2] was referred to.]

Sir Charles Doughty Q.C. and *D. C. Humphreys* for the respondent wife. The wife does not admit the facts alleged against her in the affidavits which the petitioner has filed. She will deny on oath the allegation that she has committed adultery with a second man. Before a new trial is ordered the new evidence must be shown to be such that, if it were established, it would be conclusive. The evidence contained in the affidavits which the petitioner has filed leaves the position in doubt. It is not such as would justify the court in ordering a new trial. The wife is entitled to her decree.

J. E. S. Simon Q.C. in reply referred to *Howarth* v. *Howarth* [3] and *Miller* v. *Miller and Hicks.*[4]

EVERSHED M.R. stated the facts and continued: The rub of the case made on the motion is undoubtedly this, that so far from the respondent's discretion statement being a candid admission of a single instance of adultery, she in fact committed adultery on another occasion, in another place and with another man. As is usual in such cases, the proposed affidavits, which the petitioner now has available, have been read by the court de bene esse, with a view to seeing to what those affidavits amount, assuming that the deponents gave evidence in conformity with the written words and assuming also that the evidence so given was believed. It is not in doubt that in general the rule of this court laid down long ago in *Shedden* v. *Patrick*,[1] and since followed in many cases, is briefly this, that it being in the public interest that there should be an end of litigation, fresh evidence on appeal will not be permitted unless two conditions are satisfied: the first is that the new evidence was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available; the second condition is that the fresh evidence, if true, would have had, or would have been likely to have had, a determining influence upon the decision in the court below. That, as I have said, is the general rule in the ordinary run of cases, and if it be applicable here, I have no doubt

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[2] [1951] P. 71; [1950] 2 All E.R. 375; 66 T.L.R. (Pt. 2) 493.

[3] (1884) 9 P.D. 218.

[4] (1862) 2 S. & T. 427.

[1] L.R. 1 Sc. & D. 470.

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that the conditions would not be satisfied—particularly, I have no doubt that the first condition is not shown to be fulfilled.

To make that clear, I must say a little about what this fresh evidence, if admitted, amounts to. The main witness (the person from whose evidence or from whose assistance all else, so far as I can see, has flowed) is a Mrs. Randall. She was well known to the petitioner at the date of the trial and had been well known to him for many years. In fact, as I understand the circumstances of the case, the petitioner and the respondent had lived with her originally in 1942, and had then lived at her house (that is to say, she was their landlady) from 1949 onwards. As the petitioner himself says in the course of his own deposition, he had seen and spoken to Mrs. Randall " almost every day " during the previous 12 months. It is true that the petitioner goes on to say that she never disclosed to him the information now set out in the affidavits. But he does not say that he ever inquired of her whether she had any information to impart; and there is therefore no evidence to show that the petitioner or those advising him made any attempt to ascertain whether Mrs. Randall had any information which would be useful to the petitioner's case, or made any particular inquiry beyond the circumstances surrounding the particular instance of adultery which they alleged. Indeed (and I take what I am about to say from the petitioner himself), he was advised that the case which he was alleging on that particular matter was so strong that there was no doubt as to the result. I add also that the petitioner was acquainted with (though not " well acquainted " with) two other of the deponents.

A good deal of this proposed new evidence is directed to showing that the respondent was better acquainted with the co-respondent than she had led the court to suppose. Nothing in it suggests or leads to the inference that any other acts of adultery were committed with him than those to which she herself deposes in her discretion statement, unless the fact that he wrote her letters and advanced her money from time to time might lead to that inference. I quite follow the suggestion that the evidence may be said to be in conflict with her story that, when she eventually left the petitioner (driven out, as the judge found, by the petitioner's conduct), she did not then know where the co-respondent was. But I do not propose to take up further time on this part of the case. By itself, I do not think that Mr. Simon really pressed us to take the view that it would be of a convincing character. It is the specific instance of adultery with another man upon which he mainly fastens.

That matter is dealt with by two affidavits, one by a Mrs. Phyllis May Thorn, and the other of one Reginald Horace Lambley. The episode to which those two deponents direct themselves is that in May, 1950, Mrs. Thorn and the respondent arranged to go to Boston in the County of Lincoln with two male companions and there to spend the night with their respective consorts in an Hotel in Boston. Lambley, who was the consort selected for the purpose of this excursion by the respondent, goes so far as to say that, having signed the hotel register in his own name, he and the respondent occupied a double-bedded room, that they slept together, and that he committed adultery with her. I need not say that, if that evidence is true, then the discretion statement was false and, as Mr. Simon points out, the judge at the trial was induced to grant the decree in favour of the wife upon a perjured discretion statement, apart altogether from the effect that material might have had on the judge's general view as to the credibility of husband and wife. But, again, the first thing (and I am still regarding it from the point of view of general principle) to be considered is whether any reasonable diligence was exercised by the petitioner or his advisers in regard to this matter ? Mrs. Thorn was somebody known to the petitioner and she was also known to Mrs. Randall. I am quite satisfied that no diligence, reasonable or otherwise, was taken to try to discover this alleged evidence.

We have, of course, only examined these affidavits de bene esse and, although Sir Charles Doughty has intimated what the wife's evidence would be, it would not be right for me to indicate any concluded view on the truth of the story now put forward. But there are points about it which seem to me to call for comment, and I mention two. In the first place, Lambley, who is now the alleged adulterer, was a witness for the petitioner at the hearing. What he then said was not very helpful to the petitioner; but it was quite inconsistent, plainly, with the story he now proposes to tell. I do not forget, of course, that it is a very grave thing for anybody to swear to committing adultery, particularly so for a man who, since the alleged episode in question, has himself married. People would not, I assume, lightly swear to things of that kind. Further (and this is the second comment I make), there are inconsistencies between the story of Mrs. Thorn and that of Lambley. One says that three of the party travelled together by bus from Spalding to Boston; the other says that Lambley was met by the women only when he got to Boston. That is a relatively trifling matter no doubt,

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but still it is a point which deserves comment. Bearing in mind, therefore, the judge's view (and it is the view of an experienced judge) of the credibility of the two chief witnesses, the proposed evidence does not seem to my mind to be so convincing that I should, on that account, be seriously concerned at the result obtained by the respondent from her discretion statement. I think, therefore, that if this were a case other than a matrimonial case, I should have no difficulty in rejecting the present application on the general principles which I have stated.

But Mr. Simon raised another point, and a formidable one. It is that since the court has a particular interest in matrimonial causes and in the sanctity of marriage, the general rule which I have already stated is not, or should not be, so strictly applied in matrimonial causes. It is clear that there is no direct authority to that effect. Mr. Simon referred us to a dictum of Cotton L.J. in *Howarth* v. *Howarth*[2] and to *Sanders* v. *Sanders*,[3] and also to what was said of the latter case in the Privy Council recently in *Leeder* v. *Ellis*.[4] But I think that the most forceful judicial utterance on this particular matter comes from the decision of this court delivered by myself in *Prince* v. *Prince*.[5] That was a case in which the court had to consider the precise construction of rule 36 (1) of the Matrimonial Causes Rules, 1947, in particular what was the exact significance of the phrase "where no error of the court is alleged." In that case the question was whether the application for a rehearing under that rule had been rightly rejected by the Divisional Court, and we thought that it had. The present matter, therefore, was not directly under consideration at all, but in the course of the judgment, which involved a historical review of the rule, reference was made to a judgment of Langton J. in *Winter* v. *Winter*.[6]

One paragraph of my judgment I think I should read[7]: "The next reported case on the application of rule 36 is *Winter* "v. *Winter*.[8] In that case the husband asked for a rehearing "of the wife's petition on the ground that the decree which she "had obtained on the ground of his alleged desertion was against "the justice of the case, in that it was untrue that he had ever "deserted her, and that he now wished to put the real facts "before the court. The wife's petition had been duly served on

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[2] 9 P.D. 218.

[3] (1881) 19 Ch.D. 373.

[4] [1953] A.C. 52.

[5] [1951] P. 71; [1950] 2 All E.R. 375; 66 T.L.R. (Pt. 2) 493.

[6] [1942] P. 151; [1942] 2 All E.R. 390; 58 T.L.R. 365.

[7] [1951] P. 71, 78.

[8] [1942] P. 151.

"the husband, who had deliberately decided to do nothing to "oppose it and had not entered an appearance, so that the "petition was undefended and the wife obtained her decree. "The Divisional Court ordered a rehearing, although, as Langton "J. said in the course of his judgment, the application, so far "as the husband personally was concerned, had no vestige of "merit. The order for rehearing was made on the specific ground "that in matrimonial matters there was always something more "to be considered than the mere individual merits of the parties, "and it was the duty of the court to consider the interests of the "State, as well as the private interests in such cases." What Mr. Simon says is this: in a case where a party has not appeared to defend, a retrial may be granted when the respondent comes to the Divisional Court and says: "Although I had my opportunity before and did not take it, now I want to bring evidence "before the court to show that what the petitioner said was "untrue." It is then illogical that, where the respondent did attend and where there was evidence, he should not be permitted to obtain a second hearing, if he can show that there is important new material, which he can lay before the court, which would have seriously affected his first decision.

I am not persuaded that such a conclusion follows from what was said by Langton J. and approved in this court in *Prince* v. *Prince*.[9] And I do not think that there is a complete parallel between the case where a petitioner comes and gives evidence which is not contested, so that the judge can do really nothing but act upon that evidence, on the one hand, and, on the other, the case in which both parties attend and give their evidence and are cross-examined and the judge makes up his mind on the hearing which is the truthful witness. I think that to accede to Mr. Simon's broad proposition would be to make an exception of the most startling character to the general rule which, let it not be forgotten, is itself founded upon public policy, namely, the public interest that there should be an end to litigation. I think, if the view for which Mr. Simon contended were accepted, then in every matrimonial case, where one party or the other afterwards found that he could present a better case than he had succeeded in doing in the court below, this court might have no option but either to hear the matter over again in the Court of Appeal or grant a retrial. That, I think, would plainly be quite contrary to public policy and would not be a proper consideration of the interest of the State.

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[9] [1951] P. 71.

I do not say that there may not be cases of an exceptional character from which it appears quite plainly that the court has been deceived (and, in particular, been deceived as regards the discretion statement) and that an exception should then be made to the rule which would otherwise be applicable. But, in the first place, I have come to the conclusion that this is not such a case, for reasons which I have already indicated. And, in the second place, the existence of the Queen's Proctor must not be forgotten. The existence of that office seems to me, prima facie, to cover this sort of case in the interest of the State. If there is evidence, albeit evidence that one party or the other could with proper diligence have produced before, and if the Queen's Proctor feels able to show that the decree was obtained upon some false evidence, then he is there to protect the public interest by his intervention and to see that the process of the court is not abused. Prima facie, therefore, the interest of the State will be protected in that way and for that reason, and though there may be, as I conceive, exceptions to the general rule, they will, in my judgment, be very rare. I need not, however, pursue this matter further, because I have given sufficient reasons already for the conclusion which I reached (after, I confess, some doubt and anxiety because of the force of the argument which Mr. Simon presented to us) that this is not a case in which the fresh evidence should be admitted.

I have treated the motion throughout my judgment as being one to admit fresh evidence now. I think, however, that it was properly conceded by the parties or their counsel that, if the fresh evidence ought to be allowed, in the interests of everybody the best course would have been to direct a new trial, so that this evidence could be then given (and challenged by cross-examination or otherwise) at a new hearing; for it would be difficult, in a case of this kind, to deal with the evidence piecemeal—indeed, I think that it would be impossible.

I conclude, therefore, that this motion ought to be refused and that the petitioner ought not to be allowed now to produce this new evidence, nor should he be entitled to obtain a new trial based upon the existence and availability of that new evidence.

BIRKETT L.J. I agree with the judgment of the Master of the Rolls, and because of the unusual and rather difficult decision that is to be made, I would like to add a few words, particularly because public policy has been invoked in aid of the application.

The motion asks for leave to produce and read certain affidavits in addition to the evidence which was given before Collingwood J., and for leave to adduce the oral evidence of those witnesses, who have made affidavits, at the hearing of this appeal. But Mr. Simon made it plain that, in his view, the ultimate thing to be achieved was a new trial based largely upon the new evidence which he hoped to be able to produce.

The principles have been enunciated by my Lord, but they are conveniently set out at p. 1252 of the Annual Practice, 1952: "It is an invariable rule in all the courts . . . that if "evidence which either was in the possession of parties at the "time of a trial, or by proper diligence might have been "obtained, is either not produced, or has not been procured, and "the case is decided adversely to the side to which the evidence "was available, no opportunity for producing that evidence ought "to be given by the granting a new trial." Those were the words of Lord Chelmsford L.C. in *Shedden* v. *Patrick*,[10] which were cited by Scrutton L.J. in *Nash* v. *Rochford Rural Council*.[11] The passage in the Annual Practice continues: "The new "evidence is admissible if it would have formed a determining "factor in or an important influence on the result . . . *a fortiori* "where it would be conclusive, . . . *sed quaere* if it is admissible "if there is only a reasonable probability that, if it were given, "a different decision would be reached," and the authorities in support of those cases are there set out.

The first matter, namely, whether this evidence was in the possession of the petitioner or the petitioner's advisers at the time, or could it have been procured by reasonable diligence, must always be a difficult question for an appellate court. The printed word in the affidavit is practically all that the court has to go upon, and it is rather difficult to come to firm conclusions about it, when that is the only available material. By way of illustration, I will point out the kind of difficulty which I have experienced: Mr. Harrod, the solicitor, made an affidavit—I am making no criticism of Mr. Harrod in the smallest degree—in para. 2 of which he says: "The civil aid certificate granted in "the first instance to the petitioner, dated March 2, 1951, was "limited to proceedings for dissolution of marriage on the grounds "of adultery with one co-respondent." Then in para. 3 he says:

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[10] L.R. 1 Sc. & D. 470, 545.

[11] [1917] 1 K.B. 384, 393.

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"The evidence in my possession was of adultery committed by "the respondent with Oskar Skribis, and accordingly the petition "was settled on that ground naming the said Oskar Skribis as "the co-respondent." I find it difficult to understand quite what is meant by saying that you get a civil aid certificate limited to proceedings with one co-respondent. I should have thought myself that the civil aid certificate covered the general question of the proceedings for the dissolution of marriage. But in the second paragraph, where he says that the evidence was of one co-respondent only, I do not think that it would be an unfair inference that Mr. Harrod said: "Why, the evidence with regard to Skribis "is absolutely conclusive, and that is enough." His attention was directed to the preparation of the case upon that basis without consideration at all of anything outside it. I hope that that is not an unfair matter to raise to illustrate the kind of difficulty there is in determining this matter. Is it shown that by reasonable diligence the evidence now sought to be introduced could have been procured or was available?

My Lord has pointed out that the petitioner said in para. 7 of his affidavit: "Although I had seen and spoken to the said "Ivy Randall almost every day during the previous 12 months, "she never disclosed to me the information now set out in her "affidavit." When one looks at the affidavit of Mrs. Randall, it is really surprising to see the information which she had locked in her breast. It would appear, just summarizing the matter, that the respondent showed her all the letters which she had received from the co-respondent, showed her the money that she was being sent and informed her of the visit to Boston. Of course, it may all be true, but I am bound to say for myself that I should look upon that kind of evidence with a very critical eye.

On the first point which we are considering, namely, by the exercise of reasonable diligence could the evidence which it is now sought to introduce have been procured, the facts are that the petitioner, on his own confession, saw and talked with Mrs. Randall every day, and yet he says that not one word of this kind of thing was ever said. It is not here shown that this evidence could not by reasonable diligence have been procured or have been available at the trial.

I do not think that it is necessary to comment further upon many of the statements made in the other affidavits. I can add nothing to what my Lord said on the question whether the evidence would be a determining factor. It is a curious situation, and I never quite know how it is properly to be dealt with. In this court we listened to the affidavits de bene esse. Then we listened to Sir Charles Doughty, who said: "This is what would "be in my affidavit if I had sworn affidavits at this stage. The "advisers to the respondent have taken the view, as I think quite "properly, that it is not the moment now for us to file the "affidavit, but in due course, if it becomes necessary, we shall "ask leave to do so." This court allowed Sir Charles Doughty to say: "This is the answer that we should make to the affidavits "by affidavits of our own." It is plain, I think, that if, for example, there had been a new trial and this evidence had gone to the court and was subjected to cross-examination, a very different picture might emerge. I say no more about that than that I am content, so far as this motion is concerned, to put reliance on the first ground, namely, that it is not shown here on behalf of the petitioner that this evidence was not available at the time of the trial or could not by reasonable diligence have been procured.

At an early stage in this case I asked Mr. Simon why the Queen's Proctor had not intervened, because I felt then, and I feel now, that this was pre-eminently a case for the intervention of the Queen's Proctor. It would have saved all this trouble which has arisen, because this matter is brought on motion by the petitioner. Lord Birkenhead L.C., when sitting as a divorce judge in *Wilkinson* v. *Wilkinson*,[12] said: "It is the duty of every "petitioner in this court to place the facts of his or her case most "fully before the court; and the wholesome and well-established "rule, that on the intervention of the King's Proctor a decree "may be rescinded, if there is a failure to deal with the court with "the utmost good faith, is one that is not to be relaxed." Therefore, where part of the case (and, I think, probably the principal part of the case) sought to be made by Mr. Simon was: "Here "a decree has been granted to the wife by the exercise of the "discretion vested in the judge and that discretion has been "wrongly obtained not merely by concealment but by deliberate "perjury," I should have thought myself that it was pre-eminently a matter for the intervention of the Queen's Proctor. But it would appear from what we were told that the Queen's Proctor had said that he was quite content to leave it to the petitioner to proceed with this matter himself.

With regard to the submission made by Mr. Simon, that the invariable rule, to quote the words of Lord Chelmsford L.C. in

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[12] (1921) 37 T.L.R. 835.

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Shedden v. *Patrick*[13] about the admission of fresh evidence, did not apply in its strictness to matrimonial causes, because the State had a peculiar and particular interest in matrimonial causes, that has been dealt with fully by my Lord, and I agree with what he said. If it is said that because the State has a particular and peculiar interest in matrimonial causes therefore as a matter of public policy the invariable rule ought to be in some way relaxed, I think that the answer which has been made by the Master of the Rolls is an effective answer. The rule itself is based upon public policy, and I know of no authority which says that in matrimonial causes there is to be some particular and special rule, apart from the rules which normally apply.

In a case of this kind, the true fight usually is concerned with questions relating to alimony; and it appeared to me that where there are two people who, on the facts as disclosed, one would say could not reasonably expect ever to live together again, the battle about who is to have the decree really is fought because of the ultimate contest about the payment of alimony. But it was said here: No, the important question is the custody of this child of the age of seven. All I desire to say about it is this: there was an argument whether on the custody proceedings before the registrar or before the judge, if it appeared that an attempt was made to introduce in the custody proceedings many of the facts contained in these affidavits in order to influence the decision, the registrar or the judge could say: "I cannot deal with this; I "must deal with the matter as it came from Collingwood J." The question of the custody of the child will, of course, be in the complete discretion either of the registrar or of the judge, and he will decide what evidence he will hear and what he thinks relevant to the particular issue which he then has to determine.

In all the circumstances of this case, I think that this motion for the introduction of fresh evidence on the hearing of this appeal, in the hope that it might lead to a new trial, ought to be dismissed.

ROMER L.J. I agree. The main issues which have been presented before us on this appeal have been so fully and clearly dealt with by my Lords that I do not desire to add anything to what they have said upon them.

The only point on which I might add a word is the subject to which Birkett L.J. referred towards the end of his judgment. It was suggested during the discussion before us that, unless the proposed new evidence could be introduced in the divorce proceedings, then the facts which are adumbrated by the affidavits could not be brought to the attention of the court when it deals with an application regarding the custody of the child of the marriage, and I understand that in fact such an application is pending. If that is so (and there appears to be some doubt about it) I for my part do not think that it should be so. Some at least of the evidence contained in these affidavits would, if true, be of relevance in the custody proceedings, and in my opinion it should not be excluded merely because it did not form part of the material on which the issues of divorce were determined. To exclude evidence on a custody application on that ground would result in preventing the court from discharging its paramount duty in matters relating to the care and custody of the children, namely, to ascertain what directions will best serve the interests of the children themselves. In its examination of this matter, the court is bound to inquire into all relevant circumstances, and a circumstance, if otherwise material, is not to be regarded as irrelevant merely because it was not introduced into the divorce proceedings. I say nothing as to how the registrar or the judge before whom the custody proceedings come should deal with this evidence, or to what extent he should admit it or what steps he should take to ascertain whether it is true. All I am saying is that, for my part, I take the view that it should not be regarded as matter to be excluded from his consideration altogether, merely on the ground that it did not form part of the evidence in the divorce proceedings.

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[13] L.R. 1 Sc. & D. 470.

I agree with the result which my Lords have indicated.

EVERSHED M.R. I also agree with what has been said by my Lords with regard to the admissibility of evidence in custody proceedings.

Application for leave to call further evidence refused. Appeal adjourned.

Solicitors: *Blakeney & Marsden Popple for Cyril E. Wheeler, Brighton; Lee, Bolton & Lee for Roythorne & Co., Spalding.*

B. A. B.

1953
June 15.

Pearce J.

HAR-SHEFI *v.* HAR-SHEFI (No. 2).

Husband and Wife—Divorce—Jewish divorce in London—Parties then domiciled in Israel—Validity of divorce—Declaration of validity.

The validity of the divorce by the Rabbinical Court of Beth Din in London of two spouses domiciled in Israel will be recognized by the English court, which has power to make a declaration of the validity of that divorce on the petition of a spouse who has subsequently obtained an English domicile.

An Englishwoman, domiciled in England, married in Israel a man domiciled in that country. They came to England for a short time and a bill of divorcement was received by the wife at the Beth Din, the court of the Chief Rabbi in London. The wife remained in England; the husband returned to Israel. The Court of Appeal ([1953] 2 W.L.R. 690; [1953] 1 All E.R. 783) gave leave to the wife to present a petition for a declaration as to the validity of that decree in this country:—

Held, (1) that the decree was valid according to the law of Israel; (2) that the English court must recognize the validity of that decree by the court of the domicile; (3) that upon the facts the wife had after that decree regained her English domicile of origin.

The court, having the necessary jurisdiction in respect of domicile, made a declaration accordingly.

UNDEFENDED PETITION for a declaration that the marriage of the wife petitioner had been validly dissolved, or, alternatively, that the petitioner was no longer married to the respondent.

The following statement of facts is taken from the judgment of Pearce J.: The wife, a Jewess, was an Englishwoman born in England and domiciled in this country before her marriage. The husband, a Jew, was at all times domiciled in Israel. They met in 1949, when she was on a visit to Israel, and on January 10, 1950, they married according to Jewish law at the Chief Rabbinate at Tel Aviv. In October, 1950, the wife came to England and there had a child in December, 1950. The husband followed her in February, 1951. The marriage broke down and on September, 6, 1951, there was a Jewish divorce between the parties whereby, in the presence of Beth Din, the husband handed to the wife a bill of divorcement. That divorce was duly entered in the records of Beth Din. In December, 1951, the husband was deported to Israel, where he married again. The wife wished for a declaration that the divorce was valid in order that she might marry again in this country.

It was originally held by the judge on summons[1] that this court had no jurisdiction to make a declaration as to matrimonial status unattached to any other claim for relief, and further that, as the respondent husband was domiciled in Israel, the court had no jurisdiction to consider the validity of the husband's divorce. But the Court of Appeal by a majority held [2] that the court had declaratory jurisdiction, even though no other relief was sought. It also held that the court had jurisdiction to hear the petition, notwithstanding the fact that the husband was domiciled in Israel, if the wife were domiciled in England.

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[1] [1952] W.N. 492; [1952] 2 T.L.R. 784; [1952] 2 All E.R. 821.

John Mortimer for the petitioner. The Court of Appeal has held, upon a consideration of the petition in this case, that the court has power to make a simple declaration even though no other relief is, or can be, claimed: *Har-Shefi* v. *Har-Shefi* (*No.* 1).[3] The Court of Appeal further held that the court would have jurisdiction to hear the petition if the petitioner, subject to the validity of the Beth Din decree, had since that decree re-acquired her English domicile of origin. [Reference was made to *White* (*orse. Bennett*) v. *White*.[4]] It is submitted upon the evidence that she has formed the necessary intention to make this country her home. Denning L.J. in his judgment in the Court of Appeal [5] said that he did not place any reliance on the fact that the bill of divorcement was delivered in England, providing that it was recognized by the law of Israel. The English courts gave effect to Jewish religious divorces in *Ganer* v. *Lady Lanesborough* [6] and in *Sasson* v. *Sasson*.[7] [Reference was made to the passage in Dicey's Conflict of Laws, 6th ed., at p. 371, cited in the judgment below.]

The case is of importance to the petitioner, who is anxious to remarry; and it is therefore a proper case for the court to make the declaration prayed.

The respondent did not appear and was not represented.

PEARCE J. stated the facts and continued: The answer to the question whether the wife is domiciled in England must depend on the validity of the divorce, since if it is valid the wife may have reacquired her English domicile. It is therefore necessary for the court to investigate the validity of the divorce by the law of Israel, in order to decide whether the wife is domiciled here, and whether there is jurisdiction in this court.

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[2] [1953] P. 161; [1953] 1 All E.R. 783.

[3] [1953] P. 161.

[4] [1937] P. 111.

[5] [1953] P. 161, 171.

[6] (1790) Peake 25.

[7] [1924] A.C. 1007.

It has been proved before me that she was domiciled in England before her marriage. Once she establishes that that marriage has been dissolved it becomes possible for her to resume her English domicile, and no very cogent evidence is needed to establish that resumption. The time that she spent in Israel was short. She insisted on coming back to England before the birth of her child and, when after the divorce her husband was deported from England, she remained in England and has made her life here. On the evidence it seems to me that, provided that the validity of the divorce is proved, she has resumed her English domicile.

I am satisfied on the evidence of the senior ecclesiastical judge of the Rabbinical Court of Beth Din in London that the divorce duly took place before that body on September 6, 1951, and that it was a valid divorce according to the Jewish Rabbinical law although it was in no sense a judicial investigation.

I am satisfied by the evidence of an expert in the law of Israel that the civil courts of that country are prohibited from granting a decree of divorce, and that exclusive jurisdiction is given to the Rabbinical courts on matters of marriage and divorce concerning members of the Jewish faith domiciled in Israel. Divorces made in the Rabbinical courts are recognized as valid, and this particular divorce would be regarded as valid according to the law of Israel.

In my view, this court must recognize the validity of that divorce. In Dicey's Conflict of Laws, 6th ed., at p. 371, it is stated: "There is also no authority which has any direct "bearing on the question whether English courts will recognize "as valid divorces which are effective under the law of the "domicile of the parties although they are not the outcome of "judicial proceedings, or of legislation preceded by a judicial "inquiry. In *Preger* v. *Preger*[1] and *Spivack* v. *Spivack*[2] the "invalidity of Jewish religious divorces was taken for granted, "but in each case the domicile appears to have been English. "In *Sasson* v. *Sasson*[3] the Privy Council held that the divorce "of Jewish British subjects domiciled in Egypt effected through "the Grand Rabbinate at Alexandria was valid under the "relevant ordinances, while the *Hammersmith Marriage* case[4]

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[1] (1926) 42 T.L.R. 281.

[2] (1930) 46 T.L.R. 243.

[3] [1924] A.C. 1007.

[4] [1917] 1 K.B. 634, 642–3, 659; 33 T.L.R. 78.

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"contains dicta which suggest that a monogamous marriage "must be dissolved by the decree of a court in order that the "divorce should be recognized in England. In these circum-"stances, the question whether the English courts would "recognize divorce by consent or unilateral declaration of a type "which was at one time possible under the law of the Soviet "Union, even if it is effective under the law of the domicile, is "a matter of pure conjecture. In view of the paramount "importance of the law of the domicile in questions of status, it "is submitted that if such divorces are recognized as valid in "the country of the domicile, they should be recognized as valid "in England. If the cause for divorce is immaterial, so ought "the method to be." Then again: "It is therefore submitted "that, provided the divorce is of a type appropriate to a mono-"gamous union, it ought, on principle, to be recognized in "England if it is valid under the law of the domicile, whatever "be the method by which it was obtained."

Sasson v. *Sasson* [5] is a guide to the case now before me. In that case the parties were British subjects of the Jewish religion resident in Egypt. They were divorced by the Grand Rabbinate at Alexandria in accordance with the Jewish religion. The appeal was from the Supreme Court of Alexandria, and the appellant was asking for a declaration that the divorce was valid. Under the statute governing that court, it had no power of divorce, but it had a duty in all matters relating to marriage or other questions involving religious law and custom to recognize and apply the religious law or custom of the person concerned. The Privy Council made the declaration asked for. Lord Dunedin, giving the judgment of the Board, said [6]: "The "situation, therefore, was this. The court had no jurisdiction "itself to dissolve a marriage. It had, however, jurisdiction to "declare rights and, in matters relating to marriage (which "obviously include divorce), it was bound in the case of persons "not belonging to Christian communities to recognize and apply "the religious law and custom of the persons concerned. It is "not necessary to cite the various cases in which the power of "courts to divorce a vinculo has been discussed. The case "of *Le Mesurier* v. *Le Mesurier* [7] finally settled that the proper "and only court is the court of the domicil."

In the case before me the marriage has been validly dissolved by the only form of divorce which is open to a Jew domiciled in

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[5] [1924] A.C. 1007.

[6] Ibid. 1009.

[7] [1895] A.C. 517; 11 T.L.R. 481.

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Israel. To hold that a marriage, which has been legally dissolved according to the law of the domicile, continues binding in this country is to create confusion and hardship and is in my opinion contrary to the principles laid down in *Le Mesurier* v. *Le Mesurier*[7] and the principles of international law.

I make the declaration as asked.

Declaration accordingly.

Solicitor: *G. Parry-Jones, The Law Society.*

J. B. G.

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[7] [1895] A.C. 517; 11 T.L.R. 481.

C. A.

1953

June 23, 24.

Somervell,
Jenkins and
Hodson L.JJ.

BULL *v.* BULL.

Husband and Wife—Divorce—Desertion by wife—Wife returning to live under same roof as husband but without full resumption of normal married life—Whether wife's desertion terminated.

A wife deserted her husband for a number of months. She returned to the matrimonial home at his request and lived there for over three years before the presentation by him of a petition for divorce on the ground of her desertion; she cooked for him, but refused sexual or any other intercourse with him, having as little contact with him as was physically possible:—

Held, that the wife's desertion had been terminated and that the husband was not therefore entitled to a decree.

Bartram v. *Bartram* [1950] P. 1; 65 T.L.R. 492; [1949] 2 All E.R. 270 distinguished.

APPEAL from Judge Howard sitting as a special commissioner.

The parties were married in August, 1930. There were two children of the marriage, born respectively in 1931 and 1933. From about 1936 the wife refused to have sexual intercourse with the husband, who eventually acquiesced in this refusal. In June, 1946, the wife went, with the children, to her mother for a fortnight, but refused to return, although the husband asked her to do so, until just before Christmas of that year, when she came back of her own free will. From the time of her return, the wife not only continued to refuse the husband sexual intercourse but refused to converse with him, to sit in the same room

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[Reported by NIUL HOGG, ESQ., Barrister-at-Law.]

or at the same table with him, to go out with him, or to allow him to have his own friends to the house. She cooked his meals, although he bought his own rations, and she occasionally mended his clothes for him.

Early in 1947 the wife again left her husband and went to her mother. The husband again asked her to return, hoping that if she did so relations between them might improve. In 1948, the wife returned, but matters did not improve. Husband and wife, however, continued to live under the same roof in this state of partial estrangement down to September 9, 1952, when the husband presented a petition for divorce on the ground of his wife's desertion for the three years immediately preceding that date.

The commissioner dismissed the petition.

The husband appealed.

Donaldson Loudoun for the husband. This case is distinguishable from *Hopes* v. *Hopes* [1] because, although in both cases the degree of cohabitation during the three years before the presentation of the petition was somewhat similar, in the present case there has been an initial period of actual desertion. In *Mummery* v. *Mummery* [2] it was said that "a resumption of "cohabitation must mean resuming a state of things—that is to "say, setting up a matrimonial home together. That involves ". . . a bilateral intention on the part of both spouses so to do."

[SOMERVELL L.J. I do not see why, if the wife returned with the intention of setting up such a household as existed in *Hopes* v. *Hopes*,[3] that would not be enough to satisfy *Mummery* v. *Mummery*.[4]]

That question is answered by *Bartram* v. *Bartram*,[5] which covers the present case. If there be actual desertion by one spouse, followed by a return by that spouse which does not, in the circumstances, amount to a full resumption of cohabitation, the desertion continues no matter how long the partial resumption may last. Mere length of time cannot add to the quality of the resumption if it is, in fact, imperfect.

Reliance is also placed on *Perry* v. *Perry*.[6] Whether a resumption is a full resumption or not should be tested in this

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[1] [1949] P. 227; 64 T.L.R. 623; [1948] 2 All E.R. 920.

[2] [1942] P. 107; 58 T.L.R. 203; [1942] 1 All E.R. 553.

[3] [1949] P. 227.

[4] [1942] P. 107.

[5] [1950] P. 1; 65 T.L.R. 492; [1949] 2 All E.R. 270.

[6] [1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076.

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way: where the deserting spouse specifically lays down the conditions on which he or she will return, and these are so unreasonable that the deserted spouse, consistently with the duty laid down in *Pratt* v. *Pratt*,[7] is justified in refusing to have the deserter back, it cannot be doubted that the desertion will continue. The deserted spouse ought not to be in a worse position if the deserter, without specifically laying them down, in fact imposes such conditions after a return under one roof. The test, indeed, is the reasonableness of the deserter's offer had it, in fact, been formulated in terms. In the present case the wife's offer if so formulated would have been seen to be plainly unreasonable.

The wife did not appear and was not represented.

Somervell L.J., having stated the facts: Mr. Loudoun did not suggest that the circumstances in which these two parties were living under the same roof would justify us in coming to the finding that they had ceased to be one household and become two households, to use a phrase taken from the judgment of Denning L.J. in *Hopes* v. *Hopes*.[1] Prima facie, if a husband and wife are living under one roof neither can say that the other has deserted, although, of course, there may be limitations and restrictions on the normal and ideal marriage relationship which make it very far from a full or satisfactory marriage. *Hopes* v. *Hopes* [1] shows that where the parties are living under the same roof one has, in effect, to show that they are living as two households for a petition for desertion to succeed. It is not suggested that the circumstances which prevailed here throughout the whole of the three years prior to the petition would justify any such finding.

It is, however, submitted by Mr. Loudoun that the test is entirely different if there has been an initial period during which one side has been away from the matrimonial home in circumstances in which the court would hold that there had been desertion. He relies for that principle, which was pressed on the commissioner as it was on us, on *Bartram* v. *Bartram*.[2] That was a case where a wife had deserted her husband for some years, and then, being forced to leave the house where she was living, and there being nowhere else where she could go, she went to live in the house where her husband was living. Although one gathers that when she went there there were not two separate households as in *Hopes* v. *Hopes*,[3] it was held that her presence under the same roof as her husband did not stop the desertion running. The question is whether that decision was based on the principle for which Mr. Loudoun contends or whether it was based on some narrower ground. Undoubtedly there are words in the judgment of Denning L.J. which at any rate tend to support the wider principle for which Mr. Loudoun contends. He said[4]: "Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time," and he refers to *Mummery* v. *Mummery*.[5] Speaking for myself, I think that *Mummery* v. *Mummery*[5] and *Perry* v. *Perry*,[6] which were concerned with occasional acts of sexual intercourse and decided that they might not, having regard to the circumstances in which they took place, prevent the period running, do not really assist in the present case. Bucknill L.J. in *Bartram* v. *Bartram* refers, and, if I may say so, rightly refers, to the fact that there actual desertion by the wife had been established for many years. He said[7]: "The wife did not suggest at any time "that she had brought it to an end. The question is, do "the facts proved establish that it was brought to an end? In "my view, it can only be brought to an end if the facts show "an intention on the part of the wife to set up a matrimonial "home with the husband—quoting the words of the President "in the two cases to which I have referred. If the facts do "not establish any intention on the part of the wife to set up "a matrimonial home, the mere fact that, as a lodger, she came "to live under the same roof as her husband, because she had "nowhere else to go, does not remove the desertion which she "had already started and which continued to run." Asquith L.J. regarded the case as a borderline case of very great difficulty. I think that it is clear from his judgment that he regarded it as possible to hold that the desertion had not been interrupted simply because the wife was not a free agent but was acting under the spur of necessity in returning to live under the same roof.

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[7] [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437.

[1] [1949] P. 227, 236; 64 T.L.R. 623; [1948] 2 All E.R. 920, 925.

[2] [1950] P. 1; 65 T.L.R. 492; [1949] 2 All E.R. 270.

If I am right in thinking that that was the ratio of those two judgments, the case differs completely from the present case, where the wife was under no spur of necessity but came back and indeed came back at the request of the husband. That all happened before the material three years began to run, and there is, I think, force in the consideration which the commissioner had in mind that, although the husband may have hoped that things would improve, he asked her back knowing what had been the relationship before, with nothing but his hope that that relationship would improve. I, therefore, speaking for myself, do not think that *Bartram* v. *Bartram* [8] supports the wide proposition for which Mr. Loudoun contends, nor do I think in principle that any such proposition could be accepted or laid down. We are dealing simply with the present case and in the present case during the relevant three years the parties were living under the same roof as part of one household. Periods of physical desertion prior to the three years may in certain circumstances be relevant in considering the issue; in the present case I do not regard them as establishing that during those three years there had been desertion when plainly, applying the normal one roof principle, it is not open to the husband to say that his wife had deserted him. For these reasons I think that the commissioner came to a right conclusion and I would dismiss the appeal.

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[3] [1949] P. 227.

[4] [1950] P. 1, 6.

[5] [1942] P. 107; 58 T.L.R. 203; [1942] 1 All E.R. 553.

[6] [1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076.

[7] [1950] P. 1, 5.

JENKINS L.J. I agree. Where one spouse presents a petition for divorce on the ground of desertion by the other, and it appears that during the period of alleged desertion the parties have in fact been living under the same roof, the question at once arises whether during that period the allegedly deserting spouse was still in desertion. I think one may say that, prima facie, the fact that they have been living under the same roof is a circumstance against the view that there has been continuous desertion. Nevertheless, that circumstance is not necessarily fatal, as appears from the case of *Bartram* v. *Bartram*.[8] In the circumstances of that case this court came to the conclusion that the period of desertion had not been interrupted by the time for which the wife was living under the same roof as the husband. My Lord has referred to the facts in *Bartram* v. *Bartram*,[8] which show that there were many years of desertion during which the wife lived in a different house from the husband. Her residence in that house, which belonged to the husband, was put an end to by the husband selling it with a view to forcing her to come and live with him. There was no house other than the one occupied by the husband in which she could live consistently with her continuance in the employment in which she was engaged. She therefore came against her will and lived in the same house as the husband. The terms upon which she lived in the house were put thus[9]: "The wife refused to sleep with her husband "and slept with the adopted daughter of her husband's mother. "She never went into his rooms. She paid no attention at all "to him as a husband, never mended his clothes, cooked for "him, or went out with him. She never treated him in any way "differently from the way she would treat a lodger whom she "disliked. At times, however, she sat at the same table with "her husband and ate the common food provided for them." Those were the facts to which the decision in *Bartram* v. *Bartram*[10] was addressed, and we are now asked to apply the principle said to be deducible from that case to the very different facts of the present case. In the present case there were two periods of what may be described as actual desertion by the wife—one from June, 1946, for a matter of six months, and the other from the spring of 1947 for a matter of twelve months. Ever since the end of the latter period the parties had in fact been living under the same roof. The petition was presented on September 9, 1952, so that the last period of actual desertion was some four and a half years before the presentation of the petition. As to the circumstances in which the husband and wife had been occupying the same house since the end of the second period of actual desertion, it appears that there had been no sexual intercourse since about 1936 (which was, of course, before the first period of actual desertion) and that the wife cooked meals for the husband and occasionally did mending for him though not often, but so far as she could while living in the same house, arranged to see as little as possible of the husband. The two children of the marriage came and stayed for their holidays from time to time in the house but the family apparently never had meals together.

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[8] [1950] P. 1.

The conditions in which the parties have been living for many years now are certainly unsatisfactory and uncomfortable from the husband's point of view, and I share the sympathy expressed for him by the commissioner. Nevertheless, it would be difficult on the evidence to hold that there were here

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[9] Ibid. 2.

[10] [1950] P. 1.

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two separate households. The circumstances relied on in support of that view are weaker than those in *Bartram* v. *Bartram*,[11] and the element of compulsion on the wife to live under the same roof as the husband, which was a decisive factor in that case, is wholly absent here. I think that the parties must be taken to have been living in one and the same household on the facts of the present case, albeit it was not the kind of household normally kept by a happily married couple. Having lived with his wife on the same terms for some four and a half years preceding the presentation of the petition, the husband now says that on the strength of the initial actual desertion in 1946 the wife has ever since been in desertion from him. In my view so to hold, in the circumstances of this case, would be an unwarrantable extension of the decision in *Bartram* v. *Bartram*.[11] I agree with my Lord that on the facts the commissioner came to a right conclusion in holding as he did that the requisite period of desertion had not been made out. Accordingly, I would dismiss the appeal.

Hodson L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Gedge, Fiske & Co., agents for A. E. Floyd & Co., Great Dunmow, Essex.*

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[11] [1950] P. 1.

1953
May 6;
June 8.

Karminski J.

RASPIN *v.* RASPIN.

Husband and Wife—Divorce—Adultery—Night at hotel with woman unknown—Possible cover for genuine adulterous association—Need for proper investigation.

Where there is no background of an adulterous association, but a wife petitioner has been sent an hotel bill and evidence is given that the respondent and a woman unknown have spent the night in a hotel bedroom, the court will not necessarily make a finding of adultery. It must be satisfied that adultery was committed, and that the adultery, so called, was not merely a cover to screen an adulterous association with another woman. Notwithstanding the decision in *Woolf* v. *Woolf* [1931] P. 134; 47 T.L.R. 277, the court is not bound to find adultery.

A husband gave his wife an hotel bill and admitted spending a night with another woman at the hotel. He did not disclose her name when asked. On the wife's undefended petition for divorce on the ground of adultery that night with a woman unknown:—

Held, that the matter should be adjourned for further inquiries as to the husband's mode of life.

Undefended petition for divorce.

The parties were married in 1937, and the wife left the matrimonial home after the husband had handed to her an hotel bill on January 30, 1953, and said that he had spent the previous night with a woman at a London hotel and committed adultery. By her petition, dated March 3, 1953, the wife alleged: (a) "That the [husband] had frequently committed adultery "with a woman whose name and identity are unknown to the "[wife]"; (b) "That from January 29, 1953, until January 30, "1953, at the —— Hotel, London, W.1, the [husband] com-"mitted adultery with a woman whose name and identity are "unknown to the [wife]."

May 6, 1953. The wife gave evidence at the hearing that there had first been trouble over a girl "Elsie" in 1937, a few months after the marriage, and that she had seen the girl in the hope of ending the association. The parties occupied separate bedrooms after the first year of marriage, and marital relations ceased in 1941 at the husband's wish. On his return from overseas in 1945 he had said that he had spent his leaves with an Italian girl in Italy, and since 1946 he had visited London and spent nights away from home.

He said that on January 30, 1953, he had committed adultery at a London hotel.

Karminski J. Did he tell you with whom he had committed adultery?

The petitioner. No, he did not tell me her full name.

Karminski J. Did you ask him who it was?

The petitioner. Yes, I did.

Karminski J. What did he say?

The petitioner. He said that he was not going to tell me.

Karminski J. Did he tell you anything about her?

The petitioner. No, nothing at all.

Evidence was given by an inquiry agent who had taken a statement from the husband. In that statement the husband admitted: "On January 22, 1953, I was in London on business, "and met a woman in a restaurant, and became acquainted, "and arranged to meet her on the following Thursday and spend "a night with her at the —— Hotel, London. On Tuesday, "January 27, 1953, I booked a room by letter at that hotel for "myself and wife, and on Thursday, January 29, 1953, I met "this woman and stayed with her at that hotel, and adultery "was committed there during the night. The woman left at "about 8.45 a.m. the following morning, and I have not seen "her since, and I have no idea of her name or address." His Lordship confirmed from the inquiry agent that the husband had been asked who the woman was, and had replied that he did not know. When asked if the husband had said in which restaurant he had met the woman, the witness replied: "No, he did not "know. It was casual, he just called in."

A waiter employed at the hotel gave evidence that he had taken tea to the bedroom, which was occupied by the husband and the woman, and that he had also served breakfast. The man was then dressed, and the woman was in bed.

Barry Cross Sheen for the wife.

His Lordship asked what efforts had been made to find out who the woman was, and counsel referred to the requests made by the wife and the inquiry agent.

KARMINSKI J. One's suspicions are always slightly aroused if a husband comes back from a trip to London and presents an hotel bill to his wife and says: "I have stayed there with a "woman." The wife has given evidence that her husband would not tell her the name, whereas when questioned, and rightly questioned, by the inquiry agent, the husband said that he had met the woman in a restaurant a few days before and that he did not know her name. That is not quite the same thing.

Counsel referred to the associations in 1937 and in Italy, and submitted that there was evidence that the husband was of an adulterous disposition.

KARMINSKI J. I do not doubt that, but what worries me in this kind of case is that sometimes a husband goes through the "motions," if I may so put it, of committing adultery in order to shield the real woman in the case. That may be the case here.

Counsel submitted that if there were such a woman, the wife would have known of some association, but there was no evidence that she did. The evidence tended to show that the husband was disposed to casual acts of adultery.

Karminski J. What is worrying me is this: ought I to direct further inquiries to be made into this man's mode of life, to ascertain whether the true case is before the court, or a mere cover—I hesitated to use the word "sham." One has to investigate these cases of one night in an hotel with a background of unknown women. It may be, of course, that he is a man who picks up women in this way and takes them to hotels when he is in London. [His Lordship referred to the associations in 1937 and in Italy, and observed that those had not been of an entirely promiscuous nature. There had been no marital relations since 1941, and what puzzled him (his Lordship) was whether inquiries had been made as to the husband's present mode of life. His Lordship accepted that there was no evidence of an open association with another woman between 1946 and 1953, and continued:]

On the other hand, it is my duty to try to arrive at the truth, and I must be satisfied about this question: did the husband commit adultery with the woman on the night of January 29–30, 1953, at the London hotel, or was he merely "putting on an "act," if I may use that term, for the purpose of providing his wife with evidence. I have to be satisfied that adultery was committed. Notwithstanding the well-known decision of the Court of Appeal in *Woolf* v. *Woolf*,[1] I am not bound to find adultery.

Counsel submitted that the inference that adultery had been committed should be drawn from the adulterous disposition of the husband and the fact that he had spent a night with another woman.

Karminski J. I would not have the least hesitation in drawing it but for the complete anonymity of this woman, but I do not see why I should infer adultery in this sort of case merely because the husband spends the night, or part of it, in an hotel with another woman and thereafter, immediately thereafter, gives his wife an hotel bill. I propose to adjourn the case so that further inquiries may be made as to the husband's mode of living. He may volunteer information or something may be discovered; and although there is always the possibility of a negative result, that would be preferable to the present situation.

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[1] [1931] P. 134; 47 T.L.R. 277.

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I think that there is an absence of relevant matter which I should have if it is available.

The case was mentioned later in the day, when his Lordship was informed that since the petition had been settled the wife had learnt that the husband had been named as co-respondent in respect of alleged adultery, committed since that alleged in the present petition, with a woman S. who lived in a flat above the matrimonial home. The information was that that adultery had begun after the wife had left the matrimonial home. His Lordship gave leave for the additional allegation to be made in the present suit subject to service upon the husband and the woman named.

June 8, 1953. Evidence was given and accepted by the court that the husband had committed adultery at an hotel in Yorkshire on March 27 and 28, 1953, and on May 15, 1953, at the matrimonial home, with the named woman S.

KARMINSKI J. I am not always prepared to make a finding of adultery where an hotel bill has been sent, and a waiter is called to say that two people were in a bedroom together, but where there is no background of an adulterous association whatsoever. I am speaking only for myself, but if it is desired to obtain a decree in that sort of case I have to be satisfied of a background. In this case, until I showed signs of anxiety, nothing was done; and steps were then taken to find out what the true position was. I then found out that this man was apparently committing adultery with a married woman, on one night certainly, in Scarborough, and on one subsequent occasion in his own home. He may be living with her openly; I do not know, and I am not concerned with that. But when one comes to examine this case, its realities seem to me to be entirely different from the case as originally presented to me. It has given me some anxiety because all the facts as we now know them were not available at the last hearing. I appreciate that some of them may have come into existence not very long before the last hearing of the suit. Sometimes when a cause is presented in this way the suspicions of the court are aroused that the adultery, so called, committed at a London hotel is merely a cover to screen what I may term the real adulterous association with a known woman. I have very little doubt that that is what the husband wanted in this case. I am saying no more about it. I am prepared to exercise the

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court's discretion in the petitioner's favour, and I shall grant a decree nisi because I am satisfied now that the respondent has committed adultery. Although it is a discretion case, I think that it is a proper case in which to give the petitioner her costs against the respondent.

His Lordship added that in his view the solicitors concerned had not been guilty of any improper conduct.

Decree nisi.

Solicitors: *Blundell, Baker & Co. for Wright, Atkinson & Pearson, Keighley.*

J. B. G.

SLATER *v.* SLATER.

C. A.

1952
Nov. 11, 12, 13, 14;
Dec. 17.

Singleton, Birkett and Morris L.JJ.

Nullity—Marriage not consummated—Incapacity of husband—Wife's wish for a child—Insemination from donor other than husband, without result—Subsequent adoption of child—Date of knowledge of her remedy obtained after adoption, in November, 1949*—From that date to July,* 1951, *wife continues in matrimonial home—No approbation of marriage—Nothing in wife's conduct to make it inequitable to grant relief.*

The parties were married in 1945. Before marriage the husband, knowing that he had not developed as did other men, owing, it was said, to an accident in childhood, had consulted a medical man and informed his wife of the doctor's view that there was a very fair chance that the marriage, if it took place, might be consummated. The marriage never was consummated owing to the incapacity. In 1948, the wife, being gravely disturbed by her failure to bear a child, the parties together went to a consultant doctor who examined her and told her that she was a virgin. The wife was treated and given artificial insemination on seven occasions from a donor, who was not the husband, but without result. The parties then adopted a child. In October, 1949, the wife entered a hospital as a voluntary patient for a nervous, not mental, disorder. Just before her discharge, a month later, on November 24, 1949, the wife had an interview with the medical superintendent of the hospital.

The Court of Appeal considered that on the findings of the trial judge they ought to assume that the wife had not knowledge of her remedy for the non-consummation of the marriage before the date of that interview, that is, after the insemination treatment and after the adoption of the child. The wife herself put the date when she acquired that knowledge much later, in February, 1951. From November, 1949, to July, 1951, when the wife petitioned for a decree of nullity, she continued to reside in the matrimonial home with her husband and her adopted child, although she was away on a visit to Gibraltar from February to June, 1950:—

Held, (1) that the wife could not approbate the marriage before November, 1949, since before that date she had not knowledge of the law, that was, of her rights and her remedy, and (2) that she had not done so since that month, when she had come out of hospital after a nervous breakdown, by merely remaining in the matrimonial home, and endeavouring to live with her husband and to look after her adopted child. There was nothing in her conduct since November 24, 1949, which made it inequitable or contrary to public policy that she should be granted the relief, for which she petitioned, of a decree of nullity. That which happened after November, 1949, must be looked at in view of what had taken place before; but even so, there was no ground for refusal of relief to the petitioning wife.

G. v. *M.* (1885) 10 App.Cas. 171 followed.

W. v. *W.* [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858, distinguished.

Decision of Karminski J., who had held that the marriage was approbated, reversed.

APPEAL from Karminski J.

The facts as set out in the judgment of the trial judge were as follows: At the time of the marriage, in January, 1945, the husband, who was then a serving soldier, was 30 years of age. The wife was a young woman of 21. The husband was said to have had an accident as a small child, which resulted in the failure of his genital organs to develop in the normal way at puberty. There was uncontradicted evidence from Mr. Norbury, one of the medical inspectors to the court, who examined the husband in company with Dr. Chamberlain, and the finding on examination was that the organs of generation were infantile in character; the penis and scrotum were not developed, and the testicles were undeveloped and very small, and from those observations Mr. Norbury gave it as his opinion, which the judge said that he unhesitatingly accepted, that the husband was incapable of consummating this marriage. If corroboration of Mr. Norbury's views on his observations were needed, it was given by Dr. Mary Barton, who was called on another matter on behalf of the wife, and who told the judge that accepting, of course, Mr. Norbury's statement of fact, she had no doubt that a man who was suffering from that failure of development of the genital organs could not consummate a marriage.

So far as the wife was concerned, it was also clear to the judge that, although she had not all the symptoms or signs of virginity, she had not in fact had intercourse with the husband, or, indeed, with any other man. The signs of virginity had in part been destroyed by Dr. Barton, who had to cut the hymen at a later stage for the purposes which are related later; but the judge was satisfied (a) that this marriage had not been consummated, and (b) that the failure to consummate it was due to the incapacity—at any rate, as against this woman—of the husband.

The husband was the son of a shop walker and the wife was the daughter of a transport driver and had worked as a clerk. At the time of the marriage he was serving in the Army, and after a short honeymoon, for which he got a short leave, they lived together until his demobilization in 1946 as and when they could, or, in other words, the husband came home as often as he could and whenever he had leave. " It is clear," said the trial judge, " that attempts were made by him to consummate " the marriage, and for some time the parties were under the " impression, as I think, that it had been. It may well be " that neither of them had any very clear ideas on the subject " and, as I think—certainly in the case of the wife—no " experience; but the husband has told me—and I accept his " evidence—that he himself derived some degree of sexual gratification from the attempts which he made, and, as far as I " understood her evidence, the wife was not complaining of the " lack of gratification of intercourse but was, as time went on, " gravely disturbed by her failure to bear a child. Before the " marriage was celebrated, the husband—as I think, very " properly, knowing that he was not developed as other men " were—had consulted a doctor in Lancashire, where he lived, " and passed on to his wife the doctor's view that there was a " grave danger that the marriage might not be blessed with " children, but, as the doctor thought, a very fair chance, at any " rate, that the marriage might be consummated. I accept the " husband's story that he told his intended wife that he was " willing not to go on with the marriage if she was frightened " of what might result; but she expected, at any rate, that " considerable amount of risk, and the marriage was duly celebrated."

After the husband was demobilized, they lived mostly in or near London, and attempt at sexual relationship went on. Nothing happened either of consummation or, of course, procreation, until the spring of 1948. In that year, the parties, being concerned at their failure to produce children, consulted

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Dr. Mary Barton to obtain her advice on ~~this~~ an Egyptian position. In due course, the wife and husband called on her together and explained to Dr. Barton their difficulties and anxieties. Dr. Barton, of course, examined the wife and found that she was unquestionably a virgin and bore all the signs of virginity—that was, an unruptured hymen and undilated parts. There was no doubt that the wife was very upset by that revelation. Dr. Barton told the judge—and he accepted it—that the husband told the doctor in the wife's presence that owing to that unfortunate accident in childhood he realized that he could not consummate the marriage. In the result, the wife, in 1949, underwent treatment by way of artificial insemination from a donor other than her husband; but in the meantime, said the judge, "the husband tells me—and again, I think it is right to "say at once that I accept his evidence—that he made it clear "to his wife that he could not consummate the marriage, and "he said that she told him that she did not want a divorce, "that she was quite happy with her husband, but only wanted "a child. It is, I think, clear from the subsequent history that "the wife's mind was very largely, if not wholly, concentrated "on the matter which was of grave concern to her—namely, "the begetting of a child."

In November, 1948, the parties got into communication with the Church of England Children's Society and started negotiations, which resulted, in September, 1949, in the adoption, by an order of the court, of a child. Between April and September 16, 1949, the wife was treated by Dr. Mary Barton and given artificial insemination. Seven inseminations in all were given by the doctor, who gave them at times which, in her view, coincided with the periods when the wife was most likely to be fertile; but in fact the wife never became pregnant. In the meantime, the negotiations with the Church of England Children's Society had continued. In April, 1949, the wife and husband took to live with them a child—a small boy, then aged about two—who had been sent to them and recommended to them by the Church of England Children's Society. Although they had taken this child in with a view to adoption, they in fact never told Dr. Barton about it; and Dr. Barton proceeded to give her artificial insemination injections with a complete lack of knowledge that there was a prospect or a possibility of a child being adopted. The artificial insemination treatment ceased on September 16, 1949, but in the meantime, on August 4, 1949, the parties filed a petition, as required by the Adoption of Children Act, 1926, as amended, for the adoption of the child they had already living with them, in the Lambeth county court. In that petition, it was asserted that the parties were married in January of 1945, and, on proof of that, an order was made by the judge at the Lambeth county court—after hearing the wife, and the evidence of an officer from the London County Council, who no doubt was called to deal with the circumstances and conditions under which the parties lived—allowing the adoption. Before the matter came to the county court, under the Act, the Church of England Children's Society had, of course, made the fullest inquiries and had given a good deal of advice and, generally, had taken a very great deal of trouble about the adoption; and in the papers which they required, and which no doubt were before the court, was a certificate from the husband's doctor, in which it was set out in effect that the husband was physically incapable of being a father.

Almost immediately after the adoption of the child, the wife commenced to suffer from some form of nervous disorder and, on October 24, 1949, she was admitted to hospital as a voluntary patient and remained there for almost a month. There was no suggestion, as the judge understood the evidence of Dr. Caldwell, who was superintendent to the hospital, of any mental disease on the part of the wife, but it was equally clear that she was suffering from a very severe nervous breakdown and required prolonged treatment. She had apparently had another equally severe breakdown in 1944, before the marriage. The wife remained under Dr. Caldwell's care for a month, and about two days before her discharge as a voluntary patient from hospital, she had the usual interview with Dr. Caldwell, the medical superintendent, and she discussed with Dr. Caldwell, as the judge thought on her initiative and perfectly voluntarily, some of her matrimonial affairs, and she told the doctor that she was then contemplating divorcing her husband, as she put it, for non-consummation.

On November 26, two days after that interview, she returned to her husband, and the judge was satisfied that there was some discussion between them as to what she called divorce. Karminski J. said that her views on the matter were not, he thought, plain, because she indicated to him that she had two lines of thought that she was putting to her husband—or, rather, two grounds of complaint. One was what she termed "mental cruelty" and the other was non-consummation. The husband, the wife said, would not discuss that, or at any rate would not

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get down to any concrete propositions about divorce. The view the judge formed of the husband was that he had throughout been very much against any break-up of the marriage and had done his best to keep it alive, or at any rate to keep the family, which then consisted of himself, his wife, and this adopted child, in being.

The husband and wife lived together, not very comfortably, after those conversations, for some two or three months, and in February, 1950, the wife went on a fairly long holiday to stay with a relation in Gibraltar, and she stayed away until June, 1950. In that month she came back, and was more unhappy and less settled. She said that she found her husband domineering and difficult, and again she suggested divorce for mental cruelty or non-consummation. She did not appear to have taken any advice as to her position from any lawyer or legal adviser until February, 1951, when she consulted the Citizens' Advice Bureau and was apparently put in touch by them with a solicitor, who appeared to have told her that if she could prove the husband's impotence there was the remedy of a decree of nullity. The wife said that she did not know of that before.

The marriage broke up under most unfortunate circumstances. The husband was at that time employed as a clerk or an officer by the General Post Office, and he was charged with an offence of dishonesty. He was convicted of that offence and, in March, 1951, sentenced to nine months' imprisonment. In the view of the trial judge, although the wife denied it in evidence, that was the deciding matter which induced her to leave her husband. The husband wrote his wife from prison a number of letters, which the trial judge considered were genuine, imploring her to keep the marriage alive, and emphasizing his affection not only for her but for the child they had adopted, and desiring that when he was released from his sentence they should set up home together. The wife did not accept that view and, on July 12, 1951, she presented her present petition for a decree of nullity on the ground of incapacity.

Karminski J. said at the end of his judgment: "I am satis-"fied that, although it was a shock and a surprise to her, she "had full knowledge of the husband's incapacity at the time of "the interview, which he and she attended, with Dr. Mary "Barton in 1948, and from that time at any rate I am satisfied "that she knew full well that consummation of this marriage by "her husband was virtually impossible and that there was no "prospect, or no real prospect, of any remedy. So far as

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"the artificial insemination treatment was concerned, I have "never had any doubt in this case that the matter which was "uppermost in the wife's mind was to have a child, and that as "long as she had a child she was not at any rate greatly "concerned by the absence of the sexual relationship. It may "well be that the wife here is not a highly-sexed woman; but I "am quite certain, as I have said, that her real desire was to "have a child. The child was adopted after the artificial "insemination treatment had failed; but it is significant— "accepting, as I do, the evidence of the husband on this—that "there had been some conversation, at about the time when they "consulted Dr. Barton, about divorce. To my mind, one of the "vital features of this case is the conversation the wife had with "Dr. Caldwell on November 24, 1949. Dr. Caldwell was clear "on the subject, and I think the wife in no way dissented from "that she was contemplating divorce for non-consummation. "The word 'divorce,' of course, as a term of art, is inappropriate, because the remedy for incapacity is a decree of "nullity; but I do not think anything turns on this description "or misuse of the phrase by the wife. As Jenkins L.J. pointed "out in *W.* v. *W.*,[1] a complete knowledge of the law is not "required; it is an adequate knowledge. By that, if I may be "bold enough to interpret the adjective, is meant a knowledge "of the injury or the grievance, and the knowledge that the law "provides a remedy to the injured party. Accepting as I do the "evidence of Dr. Caldwell, and, indeed, the evidence of the "wife on this matter, I have come to the conclusion that at any "rate by the autumn of 1949 the wife was aware that the "husband was incapable of consummating the marriage, and "was aware, though her knowledge was hazy, that the law "provided a perfectly adequate remedy to her if she chose to "avail herself of it. In the view I have taken of this case, which, "as I say, is a difficult and, indeed, an anxious one, the wife quite "deliberately chose the other course—namely, to go on with this "particular husband and with the adopted child and to make her "life in the future on that basis and on no other. On that view "which I have formed, it must therefore follow that she has by "her actions approbated this marriage and can no longer claim "the relief of a decree of nullity, which she now seeks. The "petition therefore fails and must be dismissed."

The wife appealed.

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[1] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.

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C. Shawcross Q.C. and *D. Henderson* for the wife.
Ashe Lincoln Q.C. and *T. Dewar* for the husband.

The following cases, not mentioned in the judgment, were cited by counsel *: *P.* v. *S.*[2]; *R.* v. *R.*[3]; *Nash* v. *Nash*[4]; *J.* v. *J.*[5]; *Skinner* v. *Carter*[6]; *Baxter* v. *Baxter*[7]; *R. E. L.* (*otherwise R.*) v. *E. L.*[8]; and *Harthan* v. *Harthan.*[9]

Cur. adv. vult.

December 17, 1952. SINGLETON L.J. I accept fully the findings of fact of Karminski J. Both parties seem to have been unusually ignorant as to sexual intercourse and the implications attaching thereto, and neither seems to have had much knowledge as to the law. The wife said that she first discovered that she could get a decree for non-consummation when she went to the Citizens' Advice Bureau in February, 1951. It is clear, however, from her conversation with Dr. Caldwell on November 24, 1949, that she had some idea upon the subject at that time, for she told the doctor that she was seriously thinking of applying for a divorce on the ground of non-consummation.

The judge came to the conclusion that "at any rate by the "autumn of 1949 the wife was aware that the husband was "incapable of consummating the marriage, and was aware, "though her knowledge was hazy, that the law provided a "perfectly adequate remedy to her if she chose to avail herself "of it." That finding, as the judgment shows, was based on the evidence of Dr. Caldwell. It seems to me to follow that we ought to assume that she had not that degree of knowledge until about the time of her interview with Dr. Caldwell. She put it much later, as her answers show. In any case, it was after the adoption of the child and after the insemination treatment.

The husband, in cross-examination, said that he was quite satisfied that the marriage had been consummated and that it came as a surprise when his wife was found to be a virgin. He was asked: "When did you first realize that you in fact never

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* Owing to the untimely death of the reporter, it is not possible to publish the argument in this case.

[2] (1868) 37 L.J.P. & M. 80.

[3] Unreported, Nov. 14, 1934 (affirmed by C.A.). (See Latey on Divorce, 14th ed., p. 202.)

[4] [1940] P. 60; 56 T.L.R. 274; [1940] 1 All E.R. 206.

[5] [1947] P. 158; 63 T.L.R. 435; [1947] 2 All E.R. 43.

[6] [1948] Ch. 387; [1948] 1 All E.R. 917.

[7] [1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886.

[8] [1949] P. 211; 65 T.L.R. 88; [1949] 1 All E.R. 141.

[9] [1949] P. 115; [1948] 2 All E.R. 639.

"had had full intercourse with your wife?" and he answered: "I never really fully realized it until this action was brought. I "never realized there had not been any sort of complete, shall we "say, relationship, until this divorce action had been brought"; and two answers later: "From my point of view, Sir, I was sort "of perfectly satisfied; everything went off as it should be." He altered this in reply to questions from the judge, saying: "Well, "not consummated, I knew it could not be complete; I knew "that"; that is, after the wife had been found to be a virgin.

Criticism was directed at the judgment of Karminski J. in that it was said that it appeared to be based on what happened after the wife returned from hospital about November 26, 1949, and it was claimed that there was nothing thereafter which could amount to approbation. I do not regard that criticism as well-founded, for the judge had said: "But I must look at this "case in all its aspects and not rely only upon the wife's declara-"tion in the adoption proceedings." Karminski J. was seeking to follow that which had been said in the Court of Appeal only a few months ago. It may be that he would have granted a decree on the facts as proved up to November 24, 1949, for until that time the wife had no knowledge that the law gave her a remedy.

It thus becomes important to examine the history after that date. The wife, in the course of her evidence, said that they were not happy together after she came out of hospital; she tried to discuss divorce with her husband, but he would not discuss it. After she came back from Gibraltar things were rather strained between them. She could never really get him to discuss the question reasonably. The judge asked her: "Did you tell "him why you wanted a divorce?" and she answered: "Yes, I "told him I have tried to do my best, and up to the time of my "nervous breakdown—after the nervous breakdown I felt that I "just could not carry on living as we were any longer, as I felt "it would be detrimental to my health to do so." Then: "(Q.) I am not sure what that means. Were you talking about "your difficulties about intercourse, or what? (A.) Yes, my "Lord, I had mentioned that, yes. I think he was unreasonable, "and of rather a domineering nature."

In cross-examination she was asked what put into her head the matter which she mentioned to Dr. Caldwell on November 24, 1949, and she said: "It was after my illness, which I think was "rather serious. I thought it a rather serious thing to happen, "and that it would be detrimental to my health to continue "living with my husband." The husband said as to this:

"A day or two before my wife was discharged, or discharged "herself"—that is to say, on November 26, 1949—"she did "mention she had been thinking over and thought she would get "a divorce. I replied I thought it was not quite the time to "speak about it, as she was just in hospital, and being quite ill, "seriously ill, and we would talk about it afterwards."

The picture I see is that of a sick woman who had done what she could to make a success of her marriage, but who began to realize that the position was bad from the point of view of her health, though she was still anxious to do what was right towards the husband and towards the child they had adopted. She knew that the law provided a remedy, though her knowledge was hazy. The marriage had, as the judge said, become unhappy and distasteful to her, and the disgrace of her husband's conviction for dishonesty was the culminating matter which induced her to take the steps she took. It may well be that but for the dishonesty she would have put up with the position a little longer. I do not think that that affects the justice of the case.

I am unable to find that anything which happened after November 24, 1949, can be said to amount to approbation of the marriage; nor do I think that it ought to be regarded as adding to that which had gone before. It ought not to be counted against the wife that when she came out of hospital after a nervous breakdown she endeavoured to live with her husband, before and after she went to Gibraltar, and to look after the adopted child. See *Clifford* v. *Clifford*[10] and the words of Tucker L.J.[11] in that case.

All the circumstances must be examined in order to determine whether there has been approbation of the marriage so that it is inequitable or against public policy that the petition should be granted. The matters on which most reliance was placed were the adoption of the child and the artificial insemination treatment of the wife. Both those took place before the wife had knowledge that she had any remedy. So far as I can see, there is nothing which occurred after she had that (somewhat hazy) knowledge, which counts either way. True the judge said: "She deliberately chose to go on with this "particular husband and with the adopted child," but I cannot see that a woman who in such circumstances stays in the matrimonial home must thereby be said to have approbated the marriage. There is nothing in her conduct after November 24, 1949, which makes it inequitable that she should be granted relief.

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[10] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394.

[11] [1948] P. 187, 194.

In the course of a judgment delivered this morning in *Tindall* v. *Tindall* [12] I read some passages from the speeches in *G.* v. *M.*[13] No good purpose would be served by repeating those citations here. It is sufficient to say that Lord Selborne L.C. made it clear that before there can be approbation which would deprive a petitioner of the remedy which he, or she, otherwise would have, there must be knowledge of the facts and of the law.

In *W.* v. *W.*[14] Evershed M.R., Jenkins and Hodson L.JJ. all referred to, and laid emphasis on, that factor. The petitioner in that case was a meteorologist and an officer in the Royal Air Force. After he realized his wife's incapacity to consummate the marriage, there had been, on his suggestion, the adoption of two children, the first of which had died before the adoption of the second. The court was of opinion that the petitioner knew both the facts and the law, and that in view of all the circumstances there was approbation of the marriage, and the petitioner was held not to be entitled to a decree of nullity. That decision is binding on us. It was submitted, however, that the present case is distinguishable in that there is a finding by the judge that the wife did not know the law at the time of the adoption of the child. This may be thought to be a fine, or a subtle, distinction; none the less it is a real one. If, as Karminski J. found, the wife petitioner did not know that she had a remedy for the wrong done to her, the adoption of the child did not amount to approbation of the marriage; nor had anything else up to November, 1949, any such effect. That which happened afterwards must be looked at in view of what had taken place before; but, even so, I do not regard it as giving ground for refusal of relief.

There are few reported cases in which it has been held that the petitioner in a nullity suit was deprived of the relief which might have been granted to her because of the doctrine of approbation. I do not think that this is such a case. Karminski J. took great trouble; he set out his findings of fact admirably. It would appear that he felt that he must decide in the way he did because of the decision in *W.* v. *W.*[14]

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[12] Ante, p. 63; [1953] 1 All E.R. 139.

[13] (1885) 10 App.Cas. 171.

[14] [1952] P. 152.

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In my opinion this case is, on its facts, distinguishable from that case. I do not consider that approbation of the marriage on the part of the wife was shown. I would allow the appeal and grant to the petitioner the decree which she seeks.

BIRKETT L.J. I have had an opportunity of reading and considering the judgment of my Lord which has just been delivered. It contains all that I would have wished to say for myself, both upon the facts of the case and the law which is applicable thereto; and recognizing, as I do, the importance of the decision and yet feeling that the judgment of my Lord so completely covers all the material matters, I do not desire to add a separate judgment of my own.

I am, therefore, content to say that I am entirely of the same opinion and, in my view, this appeal should be allowed.

MORRIS L.J. I also have had an opportunity of reading and considering the judgment which my Lord has delivered, and I am in full agreement with it.

Appeal allowed. Decree of nullity granted to the wife.

Solicitors: *R. H. Marcus; A. M. V. Panton.*

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June 17, 18, 19;
July 14.

Somervell, Jenkins and Hodson L.JJ.

TRAVERS *v.* HOLLEY.

International Law—Husband and wife—Divorce—Domicile of choice—Change of domicile—Jurisdiction—Comity of nations—New South Wales Matrimonial Causes Act, No. 14, 1899, *s.* 16 (*a*)—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 13.

A husband and wife, shortly after their marriage in the United Kingdom in 1937, went out to Sydney, New South Wales, taking with them all their belongings, the husband believing that the Commonwealth offered him better prospects. He invested money in a business in Sydney which, however, collapsed on the outbreak of war. For a time he worked on a sheep farm in northern New South Wales, leaving the wife in Sydney, where a child had been born in 1938. Later, the husband obtained a commission in the Australian forces, and subsequently transferred to the British forces.

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In August, 1943, the wife, alleging that she had been deserted since August, 1940, filed a petition for divorce in the Supreme Court of New South Wales, and was granted a decree which was made absolute on November 13, 1944. The husband was served with notice of the petition, but did not defend it, and both husband and wife later remarried. In 1952 the husband, whose second marriage had not proved to be satisfactory, obtained a decree of divorce in the present action on the ground that the Australian decree was invalid because at the time it was granted neither husband nor wife was domiciled in New South Wales, and the wife, by remarrying, had been guilty of adultery. The wife appealed:—

Held (Jenkins L.J. dissenting) that the husband had acquired a domicile of choice in New South Wales, and the appeal should be allowed. It was therefore unnecessary to decide whether the conduct of the husband in not defending the wife's petition was conduct conducive to the wife's remarriage and alleged adultery.

Held, further (per totam curiam) that the courts of New South Wales by section 16 (*a*) of the New South Wales Matrimonial Causes Act, No. 14, 1899,[1] and the English courts by section 13 of the Matrimonial Causes Act, 1937,[2] claimed the same jurisdiction, and it would be contrary to principle and inconsistent with comity if the courts of this country refused to recognize a jurisdiction which mutatis mutandis they claimed for themselves; and that even if, while in desertion, the husband had reverted to his English domicile of origin the New South Wales court would not be deprived of jurisdiction.

Per Jenkins L.J.: The commissioner, in the course of his judgment, discussed the question whether what had to be proved in order to give the courts in New South Wales jurisdiction, based on domicile, was a domicile of choice in Australia generally, or a domicile of choice in the particular state of New South Wales. He held it to be the latter, citing *Gatty and Gatty* v. *Attorney-General* [1951] P. 444; [1951] 2 T.L.R. 599, and *Attorney-General*

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[1] New South Wales Matrimonial Causes Act, No. 14, 1899, s. 16 (*a*): "Any wife who at the time of the "institution of the suit has been "domiciled in New South Wales for "three years and upwards (provided "she did not resort to New South "Wales for the purpose of such "institution) may present a petition "to the court praying that her "marriage may be dissolved on one "or more of the grounds following: "(*a*) that her husband has without "just cause or excuse wilfully deserted "the petitioner and without any such "cause or excuse left her continuously "so deserted during three years and "upwards and no wife who was "domiciled in New South Wales "when the desertion commenced shall "be deemed to have lost her domicile "by reason only of her husband "having thereafter acquired a foreign "domicile."

[2] Matrimonial Causes Act, 1937, s. 13: "Where a wife has been "deserted by her husband, or where "her husband has been deported from "the United Kingdom under any law "for the time being in force relating "to the deportation of aliens, and the "husband was immediately before the "desertion or deportation domiciled "in England and Wales, the court "shall have jurisdiction for the pur-"pose of any proceedings under Part "VIII of the principal Act notwith-"standing that the husband has "changed his domicile since the "desertion or deportation."

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for Alberta v. *Cook* [1926] A.C. 444; 42 T.L.R. 317. As at present advised I see no reason to differ from him in this.

APPEAL from Mr. Commissioner Grazebrook Q.C.

The parties were married in 1937, the petitioner, a second lieutenant in the King's Own Scottish Borderers, 20 years old, having resigned his commission in order to marry. Finding that there were no prospects in England of his being able to earn enough to support a wife, the husband decided to go to Australia, and in November, 1937, the husband and wife went to Sydney, New South Wales, taking with them all their possessions. A child was born in August, 1938. Some time before the war the husband obtained employment in a business, into which he put a certain amount of money, but that business collapsed when war broke out. In 1940 the husband left Sydney and moved north to Armidaile, New South Wales, leaving the wife in Sydney. In 1941 he joined the Australian forces, and in 1943 obtained a transfer to the British forces. Meanwhile the wife had instituted proceedings in the Supreme Court of New South Wales for divorce on the ground of the husband's desertion. Notice of the petition was duly served on the husband, but he did not defend, and a decree was granted to the wife, which was made absolute on November 13, 1944.

Subsequent to that decree she went through a ceremony of marriage in the state of Michigan, U.S.A., with the co-respondent in the present action, George Holley, an American naval officer, by whom she now had a child. The husband in 1949, after being demobilized, also married again, but that marriage apparently proved to be unsatisfactory, and on legal advice he brought the present proceedings for divorce against his first wife, alleging adultery by her with George Holley, and contending that he himself had not acquired a domicile of choice in New South Wales and therefore the decree granted by the court of that state was invalid.

On December 9, 1952, the commissioner granted the husband a decree, and exercised his discretion in the husband's favour in respect of his own adultery.

The wife appealed.

Ifor Lloyd Q.C. and *P. Hollins* for the wife.

H. J. Phillimore Q.C. and *Douglas Potter* for the husband.

The arguments of counsel sufficiently appear in the judgments.

Cur. adv. vult.

July 14. The following judgments were read:—

SOMERVELL L.J. This is an appeal from the decision of Mr. Commissioner Grazebrook, who granted a decree to a husband petitioner who sought a dissolution of his marriage on the ground of his wife's alleged adultery. The respondent, by her answer, admitted the marriage but alleged that it had been dissolved by the court of New South Wales, by a decree based on the husband's desertion, which decree became absolute on November 13, 1944. She alleges that at the relevant time she was domiciled in New South Wales, the jurisdiction of that court being based on her domicile. Subsequent to that decree she went through a ceremony of marriage with George Holley in the state of Michigan, U.S.A. The adultery alleged by the petitioner husband is with the said George Holley after the ceremony, and on the basis that she had obtained a valid decree there could, of course, be no adultery. The petitioner challenged the validity of the divorce, and the respondent, by her rejoinder, raised an issue of estoppel which, though argued before the commissioner, was not argued before us.

[His Lordship stated the facts and, having referred to the evidence and to correspondence between the parties and their relatives in the United Kingdom, continued:] I have come to the conclusion that the wife's evidence, which received some support from her mother, should be accepted, and there is at any rate nothing improbable in the husband in the circumstances, as deposed to by him, having the intention which his wife attributed to him, of acquiring a domicile of choice in New South Wales. It has been said that the onus of proof is a heavy one, but in considering whether it has been discharged one must have regard to all the circumstances. If one finds, as here, that a man has decided that he has no future in England and proceeds to seek his fortune in a new country, this frequently, perhaps normally, though not necessarily, indicates an intention to settle permanently.

The second point arises in this way: section 16 (*a*) of the New South Wales Matrimonial Causes Act, No. 14, 1899, provides: "Any wife who at the time of the institution of the suit has been "domiciled in New South Wales for three years and upwards "(provided she did not resort to New South Wales for the purpose "of such institution) may present a petition to the court praying "that her marriage may be dissolved on one or more of the "grounds following—(*a*) that her husband has without just cause "or excuse wilfully deserted the petitioner and without any such "cause or excuse left her continuously so deserted during three "years and upwards and no wife who was domiciled in New South "Wales when the desertion commenced shall be deemed to have "lost her domicile by reason only of her husband having thereafter acquired a foreign domicile." The relative date, therefore, for the purpose of that court was the date when the desertion commenced, and that, as alleged by the wife, and found by the court, was in August, 1940. Apart, of course, from a special provision of this kind the relevant date under our law to consider the domicile is the date of the commencement of the proceedings. That would be, in the present case, August 23, 1943.

Mr. Phillimore, for the husband, did not dispute that if a domicile in New South Wales had been acquired it would be necessary for a further change that there should be both the intention to change and a departure in fact from the territory. He also admitted on the facts that if the date of desertion was the relevant date, there had been on that date no departure from New South Wales. If this court, therefore, was not prepared to recognize the section which I have cited as effectively making the date of desertion the material date, he wished to argue on the facts that before 1943 there had been an intention to abandon New South Wales and effective departure from it. If this point had arisen for argument it was clear that it would have been submitted upon the other side that the departure from New South Wales resulted from military duties and therefore did not avail on the issue in question. I express no opinion on these matters because it is unnecessary in my view to decide them.

Since 1937 our law has provided that in the case of a deserted wife the date of the desertion is the relevant date. Section 13 of the Matrimonial Causes Act, 1937, reads: "Where a wife has "been deserted by her husband, or where her husband has been "deported from the United Kingdom under any law for the time "being in force relating to the deportation of aliens, and the "husband was immediately before the desertion or deportation "domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII of the "principal Act notwithstanding that the husband has changed "his domicile since the desertion or deportation." Although the wording is different the result for present purposes is the same as the provisions of the New South Wales Act. On principle it seems to me plain that our courts in this matter should recognize a jurisdiction which they themselves claim. I did not myself really understand on what grounds it was submitted that the result should be otherwise.

If it is necessary to refer to authority, there is a sentence in the opinion in *Le Mesurier* v. *Le Mesurier*[1] where it is said: "A decree of divorce a vinculo, pronounced by a court whose "jurisdiction is solely derived from some rule of municipal law "peculiar to its forum, cannot, when it trenches upon the "interests of any other country to whose tribunals the spouses "were amenable, claim extra-territorial authority." Applying this principle, the provisions of the New South Wales Act of 1899 are since 1937 no longer, so far as our courts are concerned, peculiar to its forum, but are common to its forum and our own.

Having come to this conclusion it is unnecessary to consider the difficult matters which to my mind would have arisen if the decree in New South Wales was invalid. It is on the face of it very difficult to see how the husband petitioner can claim relief as for a matrimonial offence in respect of the intercourse with Mr. George Holley. Apart from any question of estoppel, the position is obviously very unusual. I desire to express no opinion, but merely to indicate that, speaking for myself, I think that it might well have been argued that there was conduct conducing, or that the discretion of the court should not be exercised in his favour.

For these reasons I would allow the appeal.

JENKINS L.J. It is not in dispute that (apart from the question of estoppel) the New South Wales decree was made without jurisdiction, and therefore invalid, if the husband never in fact acquired a domicile of choice in New South Wales. It is further not in dispute that the onus of proving the abandonment of a domicile of origin in favour of a domicile of choice is upon the person alleging the change of domicile; and that to discharge such onus it must be clearly shown that the individual whose domicile is in question removed from the country in which he had his domicile of origin to the country alleged to have become his chosen place of domicile with a definite and fixed

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[1] [1895] A.C. 517, 528; 11 T.L.R. 481.

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intention (what Lord Westbury in *Bell* v. *Kennedy*[2] called "a settled and fixed intention," and Lord Halsbury in *Winans* v. *Attorney-General*[3] "a fixed and determined purpose") then or subsequently formed of making the latter his permanent home in substitution for and to the exclusion of the former. The question is whether the evidence in this case suffices to discharge the onus resting upon the wife.

[His Lordship stated the facts and, having referred to the evidence, continued:] I find it, for my part, impossible to hold, consistently with the authorities, that the evidence suffices to establish that the husband had at any time before the presentation of the wife's petition in the New South Wales court acquired a domicile of choice in New South Wales in substitution for his English domicile of origin. Change of domicile, particularly where the change is from the domicile of origin to a domicile of choice (as distinct from a change from one domicile of choice to another) has always been regarded as a serious step which is only to be imputed to a person upon clear and unequivocal evidence.

For this proposition I need only refer to Lord Macnaghten's speech in *Winans* v. *Attorney-General*,[4] where, referring with approval to Lord Westbury's speech in *Bell* v. *Kennedy*,[5] he said: "Such an intention, I think, is not to be inferred from an "attitude of indifference or a disinclination to move increasing "with increasing years, least of all from the absence of any "manifestation of intention one way or the other. It must be, "to quote Lord Westbury again, a 'fixed and settled purpose.' "'And,' says his Lordship, 'unless you are able to show that "'with perfect clearness and satisfaction to yourselves, it "'follows that a domicil of origin continues.' So heavy is the "burden cast upon those who seek to show that the domicil "of origin has been superseded by a domicil of choice! And "rightly, I think. A change of domicil is . . . serious enough "when the competition is between two domicils both within the "ambit of one and the same kingdom or country—more serious "still when one of the two is altogether foreign. The change "may involve far-reaching consequences in regard to succession "and distribution and other things which depend on domicil;" and to Lord Buckmaster's speech in *Ramsay* v. *Liverpool Royal*

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[2] (1868) L.R. 1 Sc. & Div. 307, 320, 321.

[3] [1904] A.C. 287, 288; 20 T.L.R. 510.

[4] [1904] A.C. 287, 291.

[5] L.R. 1 Sc. & Div. 307, 321.

Infirmary,[6] where he said: "The law upon the matter is settled. "A domicil of origin can be changed and in its place a domicil "of choice acquired, but the alteration is a serious matter not to "be lightly assumed, for it results in a complete change of law in "relation to two of the most important facts of life, marriage "and devolution of property. This is admirably expressed by "Lord Curriehill in *Donaldson* v. *M'Clure*,[7] in words unnecessary to repeat, which were expressly approved by Lord Halsbury "in *Marchioness of Huntly* v. *Gaskell*.[8] To acquire a new "domicil it is essential, in the words of Lord Wensleydale in "*Aikman* v. *Aikman*,[9] to show that the person who is said to "have changed his domicil 'has abandoned his former domicil "'animo et facto.'"

In the present case the evidence from which we are invited to infer the alleged change of domicile seems to me to be wholly inconclusive, even if the essential requirement of intention to settle permanently could be held to be satisfied by proof of a decision by the husband to settle permanently in some part or other unspecified of Australia, as distinct from a decision on his part to settle permanently in the particular state (that is, New South Wales) in which the disputed jurisdiction was exercised on the footing that he was domiciled there. If it is necessary (as I take it to be) to prove an intention on the part of the husband to settle permanently in New South Wales as distinct from any other part of Australia, there is, so far as I can see, no evidence at all of such intention, beyond the bare fact of his actual residence in that state, in the succession of temporary abodes, from January, 1938, to February, 1941, which, in my view, clearly cannot suffice.

The commissioner, in the course of his judgment, discussed the question whether what had to be proved in order to give the courts in New South Wales jurisdiction based on domicile was a domicile of choice in Australia generally, or a domicile of choice in the particular state of New South Wales, and held it to be the latter, citing *Gatty and Gatty* v. *Attorney-General*,[10] (as to the jurisdiction of the courts of particular states of the U.S.A.) and *Attorney-General for Alberta* v. *Cook*,[11] (as to the jurisdiction of the courts of particular Provinces of Canada) and expressing the view that the same principles should be applied with respect to New South Wales. As at present advised I see no reason to differ from him in this; but as he not only found it impossible to hold in the present case that there was ever a domicile of choice in New South Wales, but also said that he was not satisfied that a domicile of choice in Australia (that is, in Australia generally as distinct from the particular state) had been established, and as I agree with him on both points, it is unnecessary to pursue the question further.

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[6] [1930] A.C. 588, 590; 46 T.L.R. 465.

[7] (1857) 20 D. 307, 321.

[8] [1906] A.C. 56, 66.

[9] (1861) 3 Macq. 854, 877.

[10] [1951] P. 444; [1951] 2 T.L.R. 599.

[11] [1926] A.C. 444; 42 T.L.R. 317.

It follows that, in my opinion, the commissioner was right in his conclusion that the decree of the New South Wales court was made without jurisdiction and was therefore invalid. The contention raised for the wife to the effect that the husband was estopped from challenging the validity of the New South Wales decree was not pressed before us, and I need only say with regard to it that I agree with the commissioner's decision that it should be rejected, and with the reasons given by him for so deciding.

I would for my part dismiss the appeal. The husband's conduct in permitting the New South Wales decree to be made in default of defence and in acting on the footing that it was a valid decree by himself remarrying did not amount to conduct conducing to the wife's adultery. My Lords take a different view as to the New South Wales decree. They have found it possible to hold on the evidence that the husband had acquired a domicile of choice in New South Wales before the presentation of the wife's petition. Beyond expressing my regret that I have found myself unable to follow them in so holding, I need only add that I would not dissent from their conclusion to the effect that on the footing that the husband had acquired a New South Wales domicile the fact, if it was the fact, that while in desertion from her, and before the presentation of her petition, he abandoned his New South Wales domicile, and reverted to his English domicile of origin, should not be held to have deprived the New South Wales court of jurisdiction, having regard to the terms of section 16 (*a*) of the New South Wales Matrimonial Causes Act, 1899, and section 13 of our own Matrimonial Causes Act, 1937.

HODSON L.J., having stated the facts and referred at length to the evidence, said: Bearing in mind the circumstances surrounding the departure from England to a Commonwealth country, and the general probabilities of the case, particularly the letters which the husband wrote on reaching his destination—which the commissioner did not see—I would say that the evidence pointing to the acquisition of a domicile of choice in

New South Wales ought to be accepted, and that the contrary indications do not counterbalance this evidence. The letters written to his mother from the year 1940, in which his disappointment was expressed, point no doubt to an intention to leave Australia, but do not indicate that the husband had not previously settled in Australia with the intention of remaining there permanently. The husband has contended that even on such a finding of fact he is entitled to succeed because the New South Wales court would have no jurisdiction in the eyes of the courts of this country to dissolve the marriage, unless at the date of the institution of the proceedings in New South Wales both parties were there domiciled. The letters to which I have referred, and the husband's physical departure from New South Wales before proceedings were instituted, albeit under military orders, show, it is said, the fact of departure and the intention to abandon the domicile of choice in New South Wales if such were ever acquired. It is not, I think, necessary to form any conclusion as to when the husband abandoned his domicile of choice in Australia, since I think that even if he had done so at some time before the date of the institution of the New South Wales proceedings, and after the date of the desertion, the husband's contention fails.

The argument is that domicile of both spouses at the time of the proceedings is the sole test of jurisdiction in divorce: see *Le Mesurier* v. *Le Mesurier*,[12] which unequivocally established this test. Since the decision in that case the English courts have not recognized a decree of a foreign court unless the parties were at the time of the proceedings domiciled in the jurisdiction of the foreign court, or, if domiciled elsewhere, such decree would be recognized by the law of the domicile: *Armitage* v. *Attorney-General*.[13] For this purpose New South Wales is a foreign court, and, it is said, the husband not being domiciled in New South Wales in August, 1943, the courts of this country will not recognize the decree of the court of that state.

I think that this argument is not valid at the present day. For many years after the decision in *Le Mesurier's* case [12] the position was that the courts of this country only exercised jurisdiction in cases where both parties were domiciled here. Following certain dicta of Sir Gorell Barnes in *Ogden* v. *Ogden*,[14] there was thought to be an exception to this rule in the case of wives deserted by husbands who at the time of the desertion were

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[12] [1895] A.C. 517.

[13] [1906] P. 135; 22 T.L.R. 306.

[14] [1908] P. 46, 82; 24 T.L.R. 94.

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domiciled in England. It was thought that they might obtain a decree in this country although this country was not the true domicile of the husband. In undefended cases these courts did not inquire what had happened to husbands after desertion in such circumstances, either because it was thought they were estopped from denying an English domicile or because the burden was upon them to show an abandonment and they had done nothing to discharge the burden.

When the question was raised in a defended case, however, the decision was against the view that there was any exception to the rule: *H.* v. *H.*[15] Indeed, the supposed exception had been adversely criticised in *Attorney-General of Alberta* v. *Cook.*[16] The position has, however, been radically altered by statute. By the Matrimonial Causes Act, 1937, s. 13, it was provided that " where a wife has been deserted by her husband . . . and " the husband was immediately before the desertion . . . domiciled " in England and Wales, the court shall have jurisdiction for the " purpose of any proceedings " concerned with divorce. Since 1937 this exception has been largely extended, first by the Matrimonial Causes (War Marriages) Act, 1944 (a temporary war measure), and later by the Matrimonial Causes Act, 1950, s. 18. It is unnecessary to consider the effect of these later statutory provisions since, at the material time, when the New South Wales proceedings were instituted, the Act of 1937 was in force and section 13 of this Act corresponds in substance with the provision under which the New South Wales court claimed jurisdiction between the parties to this appeal.

It seems to me, therefore, that Parliament has cut the ground from the argument put forward on behalf of the husband. If English courts will only recognize foreign decrees of divorce where the parties are domiciled in the territory of the foreign court at the time of the institution of proceedings, because that is the jurisdiction which they themselves claim, what is the situation when the courts of this country arrogate to themselves jurisdiction in the case of persons not domiciled here at the material date? It must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court.

Lord Watson, in the *Le Mesurier* case, used the following language[17]: " A decree of divorce a vinculo, pronounced by a

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[15] [1928] P. 206; 44 T.L.R. 711.
[16] [1926] A.C. 444.
[17] [1895] A.C. 517, 528.

"court whose jurisdiction is solely derived from some rule of "municipal law peculiar to its forum, cannot, when it trenches "upon the interests of any other country to whose tribunals the "spouses were amenable, claim extra-territorial authority." Conversely, it seems that where it is found that the municipal law is not peculiar to the forum of one country but corresponds with a law of a second country, such municipal law cannot be said to trench upon the interests of that country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which mutatis mutandis they claim for themselves. The principle laid down and followed since the *Le Mesurier* case [17] must, I think, be interpreted in the light of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here.

A further question would arise in the event of the decision of this court being given against the validity of the New South Wales decree. The husband has remarried since the New South Wales decree, and so has the wife. This is not a suit for nullity presented by a petitioner on the ground that the previous marriage still subsists, but a suit for divorce on the ground that he has suffered the matrimonial wrong inflicted upon him by the other party to that previous marriage. Since he stood by in the New South Wales proceedings and allowed a decree to be pronounced against him the question arises whether he is entitled to complain that the wife's subsequent marriage is an adulterous union to which he did not conduce, and if by his conduct he did conduce to her adultery the court would have to consider this discretion bar to a decree. A further question would arise in any event whether the discretion of the court should be exercised in his favour in respect of adultery flowing from the union which he has himself contracted on the footing that he was validly divorced. The existence of conduct conducive in somewhat similar situations was discussed in *Lankester* v. *Lankester and Cooper* [18] and *Clayton* v. *Clayton and Sharman*,[19] decided by Lord Merrivale P., and it should not be taken that this court would, without further argument, pronounce a decree in favour of the husband, although the

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[17] [1895] A.C. 517, 528.

[18] [1925] P. 114; 41 T.L.R. 594.

[19] [1932] P. 45; 48 T.L.R. 191.

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point was not taken by the wife in these proceedings that he was disentitled thereto on any ground which would constitute a discretionary bar to divorce.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *Patersons, Snow & Co., for Mee & Co., Retford; L. A. E. Stiles.*

A. W. G.

1953
July 13, 14, 30.

Somervell, Jenkins and Hodson L.JJ.

SWAN *v.* SWAN.

Husband and Wife—Divorce—Cruelty—Insanity—Whether insanity a defence to a charge of cruelty—Condonation.

One spouse cannot be said to have been treated with cruelty by the other when that other was at the time suffering from such a defect of reason, from disease of the mind, as not to know the nature and quality of the acts complained of.

Per Hodson L.J.: "I can find nothing in the old authorities to "justify the proposition that a decree based on cruelty is a remedy "given not for a wrong inflicted but solely as a protection for the "victim."

Quaere the case where a person knows what he is doing but does not know that it is wrong.

Lissack v. *Lissack* [1951] P. 1; 66 T.L.R. (Pt. 1) 1235; [1950] 2 All E.R. 233 disapproved; *M'Lachlan* v. *M'Lachlan*, 1945 S.C. 382 not followed; *Hall* v. *Hall* (1864) 3 Sw. & Tr. 347 and *Squire* v. *Squire* [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51 considered.

The mere fact that a wife receives and cares for her invalid husband when he returns home unexpectedly from hospital does not of itself constitute condonation.

Per Hodson L.J.: "I feel the conception of forgiveness "difficult if not impossible where the object of the forgiveness is "not capable of receiving it by reason of the fact that he is out "of his mind."

Appeal from Mr. Commissioner Grazebrook.

The parties were married in 1935 and there were two children of the marriage. In 1927 the husband had for some months been certified insane, but the wife did not know of this at the

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[Reported by Niul Hogg, Esq., Barrister-at-Law.]

time of the marriage. During the spring of 1941 the husband was a voluntary patient in a mental institution at Epsom. In July, 1943, he became ill with tuberculosis and entered a sanatorium at Bournemouth, where he remained until he returned home in April, 1944. From then until a date in August, 1947, he treated his wife with violence, threats of violence and unreasonable behaviour which was held to amount to cruelty. In August, 1947, the husband's health again being affected with tuberculosis, he was admitted to the Osler Pavilion, in Headington, for treatment. In August, 1949, he arrived home unexpectedly from Headington. The wife received the husband and looked after him, there being no one else to do so; but he soon began his violence and threats again and she sent for the doctor. On September 22, 1949, the husband was removed to the Littlemore mental institution for observation, and on October 6 he became a voluntary patient there. Apart from a few weeks at Headington, where he was again treated for tuberculosis, the husband remained a voluntary patient at Littlemore down to the date of the petition in February, 1952, and since that date.

It was proved that from September, 1949, and probably from some weeks earlier, the husband was suffering from such a defect of reason, from disease of the mind, as not to know the nature and quality of his acts, or that he was doing what was wrong. The commissioner held that by taking the husband back in August, 1949, the wife had condoned his previous cruelty, and that, in view of his insanity, the husband was not responsible for acts of his committed after that date which would otherwise have been cruelty. The commissioner accordingly dismissed the petition and the wife appealed.

Ifor Lloyd Q.C. and *Thomas Dewar* for the wife. The evidence does not warrant the commissioner's finding of condonation during the period August to September, 1949. [The evidence relating to that period was reviewed.]

[HODSON L.J. Is not the husband's insanity a bar to his being forgiven?]

It may well be so. So far as the question of insanity itself is concerned, however, it is first contended that the evidence here is not strong enough to support the finding of insanity within the M'Naghten rules. But, in any event, the authorities do not show that insanity is a defence to a petition based on cruelty, but rather the reverse. In *White* v. *White* [1] two members of the court did not find it necessary to decide the question, but Denning L.J. based his judgment on the proposition that a decree in a cruelty case was made for the protection of the injured spouse, and that the need for protection was greater rather than less where the other spouse was unable to control his violence by reason of his insanity. That judgment was followed in *Lissack* v. *Lissack*,[2] and the decision in the earlier Scottish case of *M'Lachlan* v. *M'Lachlan* [3] is to the same effect.

[SOMERVELL L.J. How can an insane man " aim " his acts at his spouse, it being agreed that it is necessary for the acts to be " aimed "?]

It is enough if they are " aimed " physically. There is no need for any intent to injure: *Squire* v. *Squire*.[4] In the same way, in a civil action for trespass to the person insanity is no defence: *Morriss* v. *Marsden*.[5] In none of the authorities, old or new, has it been held that insanity affords a defence to cruelty. There are, however, in many of these cases obiter dicta which seem to show that it is not a defence. Reliance is placed on what was said in the following cases: *Evans* v. *Evans* [6]; *Holden* v. *Holden* [7]; *Kirkman* v. *Kirkman* [8]; *Westall* v. *Westall* [9]; *Kaslefsky* v. *Kaslefsky* [10]; *Hanbury* v. *Hanbury* [11]; *Brittle* v. *Brittle (by his guardian)* [12]; *Mackrell* v. *Mackrell*.[13]

Stuart Horner and *L. I. Stranger-Jones* for the husband. In regard to the disputed issues of fact, reliance is placed on the opinions expressed in the House of Lords in *Watt (or Thomas)* v. *Thomas* [14] as to the danger of overruling the tribunal which had the advantage of seeing and hearing the witnesses. These opinions are equally apposite in considering the evidence on which the commissioner found both condonation and insanity to have been proved. As to what is required to establish condonation, and its effect when it has been established, see *per* Lord Simon in *Henderson* v. *Henderson and Crellin*.[15]

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[1] [1950] P. 39; 65 T.L.R. 524; [1949] 2 All E.R. 339.
[2] [1951] P. 1; 66 T.L.R. (Pt. 1) 1235; [1950] 2 All E.R. 233.
[3] 1945 S.C. 382.
[4] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51.
[5] [1952] 1 T.L.R. 947; [1952] 1 All E.R. 925.
[6] (1790) 1 Hag.Con. 35.
[7] (1810) 1 Hag.Con. 453.
[8] (1807) 1 Hag.Con. 409.
[9] (1949) 65 T.L.R. 337.
[10] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.
[11] [1892] P. 222; on appeal, 8 T.L.R. 559.
[12] [1947] 2 All E.R. 383.
[13] [1948] 2 All E.R. 858.
[14] [1947] A.C. 484; [1947] 1 All E.R. 582.
[15] [1944] A.C. 49, 52; 60 T.L.R. 113; [1944] 1 All E.R. 44.

[JENKINS L.J. But the husband was not in any condition to give an undertaking to reform.]

There is some evidence that he was; he wrote a letter from the hospital which would seem to show that. As to the question whether insanity is a defence to a petition based on cruelty, the judgment of Denning L.J. in *White* v. *White*[16] was, in effect, a minority judgment and was quite at variance with the opinions of the other members of the court, in particular with that of Asquith L.J. In so far as *Lissack* v. *Lissack*[17] was decided on the ground that insanity is no defence, it is submitted that it was wrongly decided. This court is not bound by decisions of the Divorce Division, or, for that matter, by decisions of the Court of Session. None of the judges whose dicta have been read to the court had in mind such a case as this, nor was their language wide enough to embrace such a case. On the other hand, Sir James Wilde, in *Hall* v. *Hall*,[18] made it clear that he thought that actual insanity would be a defence, and reliance has always been placed on that dictum. In addition, the judgments in *M'Lachlan* v. *M'Lachlan*,[19] particularly that of Lord Moncrieff,[20] do not support the wife's argument.

Cur. adv. vult.

July 30. The following judgments were read, Hodson L.J., at the request of Somervell L.J., delivering the first judgment.

HODSON L.J. This appeal is against an order of Mr. Commissioner Grazebrook dismissing a petition presented by the wife on the ground of cruelty of the husband. The husband, by the Official Solicitor, his guardian ad litem, denied the cruelty and further said that, if he had been guilty of any uncondoned act of cruelty, he did not know the nature or the quality of the act and did not know the act was wrong and was not responsible for the act.

The commissioner found that the husband had been guilty of cruelty up to and including the month of August, 1947, but that such cruelty was condoned. He further found that later acts of violence inflicted upon the wife and threats used by the husband against her, took place at a time when the husband had proved that he did not know the nature of the acts and did not know they were wrong. Accordingly, he found that the cruelty proved had not been revived, since the later acts and threats did not amount to cruelty in law, and dismissed the petition.

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[16] [1950] P. 39, 57.

[17] [1951] P. 1.

[18] (1864) 3 Sw. & Tr. 347, 349.

[19] 1945 S.C. 382.

[20] Ibid. 388.

The case was conducted on the footing that no question arose as to the responsibility of the husband for his acts prior to and including August, 1947, and, although the history of the husband as disclosed by the evidence shows marked mental instability over a long period of his life, the evidence relied upon on his behalf is concentrated upon the period beginning in August, 1949. During this period alone it was alleged and proved that he did not know the nature of his acts and did not know whether they were right or wrong.

[His Lordship stated the facts and continued:] Cruelty having been proved down to August, 1947, the first question is whether or not the cruelty was condoned. The violence of the husband continued until he went into hospital in August, 1947, when the wife called in medical aid, and I do not think it could be said that such cruelty was condoned up to that time. Everything, therefore, turns on the circumstances which existed during the short period from August, 1949, until September 22, 1949, when the parties were together for the last time. This period was very short. There was no sexual intercourse; this had ceased many years before. The husband was ill and in common humanity it was natural and reasonable for the wife to take him in. She and the children had nowhere else to go. She said in evidence: "In August, 1949, he came home unexpectedly. I "think he was discharged rather quickly. He was in a very bad "state. He was very violent and very hopeless to live with." She then described how he dug a hole in the garden to bury her in and said he was going to strip her and beat her through the village if she did not make him tea at one o'clock in the morning. Thereupon, she said, she telephoned for the doctor who came and saw the husband. Admittedly, the wife did all she could for the husband during this period; she had welcomed him home as her husband although she was apprehensive of him, but I cannot see how her conduct in relation to this particular man, who did not know what he was doing, can be taken to be condonation. The element of forgiveness, albeit conditional forgiveness, is always present in condonation. Viscount Simon in *Henderson* v. *Henderson*,[1] taking a case where a wife had been guilty of a matrimonial offence, said: "The essence of the matter is . . . that

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[1] [1944] A.C. 49, 52; 60 T.L.R. 113; [1944] 1 All E.R. 44.

"the husband with knowledge of the wife's offence should forgive "her and should confirm his forgiveness by reinstating her as "his wife." I feel the conception of forgiveness difficult if not impossible where the object of forgiveness is not capable of receiving it by reason of the fact that he is out of his mind. I would therefore hold that the cruelty up to August, 1947, had not been condoned.

The commissioner, having decided that this cruelty had been condoned, was bound to consider the allegations of cruelty during the period beginning at some date in August, 1949, and ending on September 22, when the husband was taken away for the last time, first to be kept under observation, and later as a voluntary patient at Littlemore and where, apart from a short period in a hospital for tuberculosis at Headington, he has been ever since. During this period the husband was violent and behaved in a manner which can fairly be characterized as insane. I have already given some examples of his conduct. In addition, he threatened the wife with a razor blade under a delusion that there was an Indian outside the house who was in some way being encouraged by the wife. When he was at Littlemore he came under the care of Dr. Armstrong, Physician Superintendent of the hospital, who gave evidence that the husband was suffering from a schizophrenic illness of a paranoid type. He stated that, in his opinion, from the beginning of August it was probable that he did not know the nature of his acts and during the same period he would not have known whether they were right or wrong. On this and other evidence the commissioner came to the conclusion, rightly as I think, that from the beginning of August, 1949, the husband neither knew what he was doing nor whether what he was doing was right or wrong. Since the commissioner dismissed the petition for this reason and that ground has been challenged, it is, I think, right for this court to express its view upon it.

It is to be observed that the commissioner found that the husband did not know what he was doing, thus bringing into play the first branch of the so-called M'Naghten rules. Apart from authority, I should have thought that it was a contradiction in terms to describe as cruel the conduct of a person who did not know what he was doing. The word "cruel" carries with it implications of guilt which can no more be imputed to such a person than to a sleep walker. In this connexion, I would cite the words of Evershed L.J. in *Squire* v. *Squire*[2]: "I do not "attempt any definition of the words 'cruel' or 'cruelty' save "to say that the conduct complained of must at least satisfy "the ordinary acceptation of those English words, and that, on "well-settled authority, it must be such as to have injured in "fact the complainant's mental or physical health or be such "as to cause real apprehension of such injury." The Matrimonial Causes Act, 1857, s. 27, used the phrase "guilty of . . . "cruelty." The Judicature (Consolidation) Act, 1925, s. 176 (*c*), as amended, employed the phrase "treated . . . with cruelty," and this language is reproduced in the Matrimonial Causes Act, 1950. The word "guilt" carries with it the sense of wrong-doing and, as Henn Collins J. pointed out in *Astle* v. *Astle*,[3] the word "treated" seems to connote a conscious act.

In *Astle* v. *Astle*,[3] a decree was granted and the statement of law was obiter. It was to the effect that the rule in *M'Naghten's* case,[4] applied so that the respondent in resisting a charge of cruelty must prove that he was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong. This dictum was consistent with the judgment of the Court of Appeal in *Hanbury* v. *Hanbury*,[5] cited by Asquith L.J. in *White* v. *White*.[6] Lord Esher is reported to have expressed himself to the following effect: "The jury found that the respondent knew "what he was doing when he committed the acts, and under-"stood their nature and consequences. . . . The jury were per-"fectly entitled to come to the conclusion they did, and he "thought that it was the only sensible conclusion at which they "could have arrived. . . . There remained a question of law. "Assuming a diseased mind, and that the diseased mind gave "him certain impulses—he would not call it an uncontrollable "impulse, as he did not know what that meant in such a case "as this—the respondent knew what he was doing, and that he "was doing wrong. An act of adultery was a culpable act "against the wife. He was prepared to lay down as the law of "England that whenever a person did an act which was either "a criminal or a culpable act, which act, if done by a person

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[2] [1949] P. 51, 61; 64 T.L.R. 371; [1948] 2 All E.R. 51.

[3] [1939] P. 415; [1939] 3 All E.R. 967.

[4] (1843) 10 Cl. & Fin. 200, 210.

[5] [1892] P. 222; 8 T.L.R. 559.

[6] [1950] P. 39, 53; 65 T.L.R. 524; [1949] 2 All E.R. 339.

"with a perfect mind, would make him civilly or criminally "responsible to the law, if the disease in the mind of the person "doing the act was not so great as to make him unable to "understand the nature and consequences of the act which he "was doing, that was an act for which he would be civilly or "criminally responsible to the law. Consequently, even though "the respondent's mind was diseased, he was as responsible to the "law as if his mind was not diseased." Lord Esher, however, left open the question whether the converse proposition was correct. He said[7]: "There was a larger question which the "President touched upon, but did not decide—namely, whether "even if the respondent's mind had been such that he did not "know the nature of what he was doing or that he was doing "wrong, the petitioner would or would not be entitled to a "divorce."

The question was debated in the Scottish case of *M'Lachlan* v. *M'Lachlan*.[8] There the cruelty founded upon in a suit for separation was the defender's violent and threatening behaviour on an isolated occasion when, in consequence of a seizure, he was temporarily irresponsible. The defender contended that he could not be guilty of cruelty at a time when he was not responsible for his actions. It was argued that guilt required volition and that the court would be legislating if it extended the definition of cruelty so as to include involuntary conduct. Lord Moncrieff delivered the leading judgment of the First Division of the Court. He stated the argument as follows: "Seeing that "the remedy is only given by our law on the ground eo nomine "of cruelty, it was however courageously maintained by the "appellant's counsel as their principal argument that this conse-"quence must be affirmed in every case where the danger "against which protection was asked had been occasioned by "conduct for which the party charged with cruelty had not been "responsible. Cruelty and guilt necessitated, to constitute either "of them, both intention and malice; unconscious cruelty was "indeed a contradiction in terms; and a man who was insane "could not be guilty of cruelty." Having stated the argument, Lord Moncrieff went on to say: "The proposition is entirely "logical and, as regards certifiable insanity may be affirmed "without hesitation or difficulty." He then went on to point out that in such a case a spouse had another remedy, but refused to accept the argument in the case in question where no such remedy existed. Regarding a decree of separation as the exact obverse of a decree of adherence, he declined to accept the proposition, regarding it as intolerable to do so where certification was not available as a remedy.

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[7] (1892) 8 T.L.R. 559, 560.

[8] 1945 S.C. 382.

This view, deliberately discarding logic, lays emphasis on the protective element in a decree of separation. In the Court of Appeal in *White* v. *White*,[8a] where the majority of the court decided the case against a respondent who was accused of cruelty on the ground that he knew the nature and quality of his acts, Denning L.J. took his stand upon this very ground, saying[9]: "It seems to me that, in divorce cases, if such a man has treated "his wife with cruelty, she will be entitled to maintenance, "judicial separation or a divorce, because there again it is not a "question of punishing him but only of giving her relief from a "situation which has been rendered intolerable by his conduct. "The presence of mental disease makes this relief more, and "not less, necessary." He cited the observations of Lord Stowell in *Kirkman* v. *Kirkman*,[10] where he said that in cruelty cases if safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone. Denning L.J. continued: "On the strength of "his authority I say that a violent and disorderly affection of "the mind, that is insanity, is of itself no answer to a petition "for divorce on the ground of cruelty." This judgment was not adopted by the other members of the court, and Asquith L.J. gave powerful reasons for taking a contrary view. It was, however, followed by Pearce J. in *Lissack* v. *Lissack*.[11]

For my part, with all respect to those who think otherwise, I think that Lord Stowell was far from saying that insanity in the sense covered by the M'Naghten rules will not relieve a person from legal responsibility for his acts in a suit founded upon cruelty. Indeed, it can be said that all cruelty derives from violent and disorderly affection of the mind. Lord Stowell's phrase was considered by the Judge Ordinary in *Hall* v. *Hall*,[12] where he said: "With danger to the wife in view, the court does "not hold its hand to inquire into motives and causes. The "sources of the husband's conduct are, for the most part, "immaterial. Thus, I have no doubt that cruelty does not cease "to be a cause of suit if it proceeded from 'violent and dis-"'orderly affections,' as said in one case, or from 'violence of

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[8a] [1950] P. 39.

[9] Ibid. 57.

[10] 1 Hag.Con. 409.

[11] [1951] P. 1; 66 T.L.R. (Pt. 1) 1235; [1950] 2 All E.R. 233.

[12] 3 Sw. & Tr. 347, 349.

" 'disposition, want of moral control, or eccentricity,' as said in " another, or 'from a liability to become excited in controversy,' " in the language of a third; but madness, dementia, positive " disease of the mind, this is quite another matter." This passage was cited as authoritative by Tucker L.J. in *Squire* v. *Squire*,[13] to which I have already referred, and Evershed L.J. in the same case used these words [14]: " If it be conceded, as in my view it " must be, that in such a case as the present proof of malevolent " design is unnecessary, all, or almost all, acts of cruelty not in " fact malevolent must proceed from some sickness or disorder " of the mind, though in many cases falling short of insanity." I respectfully agree with these observations and suggest that Lord Stowell's dictum in *Kirkman* v. *Kirkman*,[15] does not lend support to the view that insanity can be no defence to a charge of cruelty. Moreover, I can find nothing in the old authorities to justify the proposition that a decree based on cruelty is a remedy given not for a wrong inflicted but solely as a protection for the victim, as Pearce J. appears to have thought in *Lissack* v. *Lissack*.[18] In *Hall* v. *Hall*,[16] Sir James Wilde said: " Though the object of this court's interference is safety for the " future, its sentence carries with it some retribution for the past." The charge of Sir Charles Butt to the jury in *Hanbury* v. *Hanbury* [17] is often quoted in support of the " protection " view. He, however, used language which, though laying emphasis on protection, did not exclude the attribute of remedy for wrongdoing. He said: " I conceive that the object of the Divorce Act " is not so much, or nearly so much, the punishment or retribu- " tion for a marital offence as the protection of the party who is in " peril." I think, therefore, that Pearce J. went too far when he stated in *Lissack* v. *Lissack* [18]: " Since in petitions based on " cruelty the court's duty to interfere is intended not to punish " the husband for the past, but to protect the wife for the future, " the question for the court is whether the wife can with safety " to life and health live with the husband now." In so far, therefore, as Pearce J. based himself upon the proposition that insanity could not be a defence to a petition based on cruelty, I am of opinion that *Lissack* v. *Lissack* [18] was wrongly decided.

To treat cruelty in the light only of need for protection would be to take it out of the realm of matrimonial offences altogether, which is not, to my mind, consistent with the language of the

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[13] [1949] P. 51.
[14] Ibid. 62.
[15] 1 Hag.Con. 409.
[16] 3 Sw. & Tr. 347, 349.
[17] [1892] P. 222, 224.
[18] [1951] P. 1, 7.

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legislature nor with the decisions of the ecclesiastical courts which have laid the foundations of the law on this topic. Moreover, I confess that to me it seems that over-emphasis on the need for protection of the victim tends to lose sight of realities. No effective protection is, in fact, provided by decree of the court from the violence of an insane spouse. He or she can only be protected in the same way as other members of the public by the incarceration of the insane partner. If the insane spouse is not certifiable and cannot be incarcerated, it may well be that it is not only the other spouse who is in need of protection. If the respondent in *M'Lachlan* v. *M'Lachlan* [19] had been unmarried and looked after by a sister or a nurse the danger would have been the same. At least, where the insane person is unaware of the nature and quality of his acts, in other words, does not know what he is doing, I think it is not open to the courts to pronounce a decree of divorce or judicial separation on the ground of the cruelty of that person. If the violence of such a person is to be the ground of such a decree it is for the legislature so to provide. There are already grounds for divorce such as insanity (with certain limitations) and presumption of death which are outside the sphere of remedies for a wrong done by one spouse to another, but I cannot think that the courts can properly, by an extended interpretation of the phrase "treated with cruelty," add another ground to this class.

The second limb of the M'Naghten rules does not, therefore, arise in this case and would, perhaps, arise but seldom. Asquith L.J. in *White* v. *White* [20] thought it would be appropriate to apply it to a cruelty case where a person knew the nature of his acts but by reason of disease of mind did not know they were wrong. My brethren doubt whether this second limb applies to cruelty cases, having regard to the decisions in *Squire* v. *Squire* [21] and *Kaslefsky* v. *Kaslefsky*.[22] It is not necessary to express a final opinion on this point, but I myself would incline to the opinion expressed by Asquith L.J. The two branches of the rule have hitherto always been treated together and I am not satisfied that in civil as opposed to criminal matters they can properly be treated in isolation from one another.

In my opinion, therefore, the commissioner was right in refusing to make a finding of cruelty against the husband in respect of the acts done by him in 1949, but I would allow the appeal on the ground that there was no condonation of the earlier cruelty.

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[19] 1945 S.C. 382.

[20] [1950] P. 39.

[21] [1949] P. 51.

[22] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398.

SOMERVELL L.J. [having stated the facts:] The first point raised before the commissioner was whether the husband's insanity constituted a defence. Whether, in other words, to establish treatment with cruelty it is necessary that the nature of the acts should be known. Both sides relied on *Squire* v. *Squire*,[23] which decided that there could be a treating with cruelty within the statute although there was no intention to harm or hurt. On the other hand, reliance was placed in the judgments on the fact that the respondent knew perfectly well the nature of what she was doing. Tucker L.J. quotes with approval the passage from *Hall* v. *Hall*,[24] which my brother Hodson has already read. In a later passage on the same page he clearly distinguishes from the case with which he was dealing, a case in which the respondent did not know the nature and quality of the acts committed by her and relied upon as cruelty. Evershed L.J., at the outset of his judgment, emphasizes that the respondent remained at all material times responsible for her actions. In *Kaslefsky* v. *Kaslefsky* [25] the principle laid down in *Squire* v. *Squire* [23] was considered and it was held that the conduct complained of must be aimed at or actually physically directed at the petitioner or done with intent to injure him or to inflict misery on him. Bucknill L.J., in his judgment, emphasized the importance of the word "treated" in the subsection of the Act which deals with this matter. In *White* v. *White*,[26] although it was unnecessary to decide the point which we have to decide, observations were made upon it both by Asquith L.J. and Denning L.J. Asquith L.J. refers to the earlier cases in which the problem was referred to, and he inclined to the view that if the respondent did not know what he was doing or did not know it was wrong, this would be a defence. Denning L.J. took the opposite view, at any rate in certain circumstances. He thought it would make a difference if the petitioner realized that the respondent was of unsound mind. He says he could understand that "a point may be reached when the conduct was so irrational "that it was obvious to the injured party that the conduct was "not cruelty but was due to mental disease." I do not wish to base too much on the precise wording of this sentence, but its wording seems to assume that conduct due to mental disease cannot be cruelty. The question came before the Court of Session in *McLachlan* v. *McLachlan.*[27] The acts complained of were done in an epileptic seizure—a case which Asquith L.J. cited as one which, in his view, could not be cruelty. Lord Moncrieff admits the logic of the proposition that unconscious cruelty is a contradiction in terms, and affirms that proposition with regard to certifiable insanity. Where, however, the condition is not certifiable, the wife—so the argument runs—needs protection, and the logic, or as I would respectfully put it, the ordinary meaning of the words used in the statute, must give way. In the present case the husband may have been certifiable. The meaning of the statute cannot depend on whether the respondent is certified or is a voluntary patient. I have come myself to a clear conclusion that if a respondent does not know the nature of the acts they cannot be relied on as establishing a "treating with cruelty." I agree that *Lissack* v. *Lissack*[28] was wrong so far as it decided that insanity could not be a defence.

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[23] [1949] P. 51.
[24] 3 Sw. & Tr. 347.
[25] [1951] P. 38.
[26] [1950] P. 39.

In the observations in *White* v. *White*,[29] it was assumed that the relevant test in a case of this kind was that applied in criminal cases and referred to as the "M'Naghten rules." Applying *Squire's* case[30] and *Kaslefsky's* case,[31] I doubt whether this is right. I would have thought that if the respondent knew the nature of his acts it would be no defence for him to say that he or she did not know they were wrong (*Squire* v. *Squire*[30]). On the other hand, it might be a defence if it could be established that he or she did not know they were directed against the petitioner. It may be difficulty to think of circumstances in which a man would know the nature of his acts but would not know against whom they were aimed. The petitioner, therefore, being unable to rely, in my opinion, on the acts in 1949 has an alternative in the acts prior to 1947. The commissioner found that they had been condoned and that is the only defence suggested. The first question is whether they were condoned prior to the husband's departure for hospital in 1947. I do not think they were. Sexual intercourse had ceased between these parties in 1941. Notwithstanding this, the wife might de die in diem condone acts of cruelty and it is not, of course, a case in which she left the home. When, however, one considers the evidence as to the circumstances in which the husband went to hospital, I am of the opinion that she had not condoned the acts complained of.

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[27] 1945 S.C. 382.

[28] [1951] P. 1.

[29] [1950] P. 39.

[30] [1949] P. 51.

[31] [1951] P. 38.

The next question is whether she condoned what had happened before 1947 by taking him back in August, 1949. According to her evidence, which was not challenged on this point, he came home unexpectedly, he was in a very bad state, he was very violent, and was very hopeless to live with. She then goes on to describe the distressing acts which he performed, which, as I have said, would have been cruelty if he had known what he was doing. She was, in fact, a trained nurse, although my decision is not affected by this fact. Condonation is defined as the reinstatement in his or her former marital position of the spouse who has committed a matrimonial wrong—with the intention of forgiving and remitting on condition that the spouse whose wrong is so condoned does not henceforward commit any further matrimonial offence (Rayden on Divorce, 6th ed.). It would, of course, be absurd to suggest that the mere fact that she took him in when he was unexpectedly discharged amounted to condonation. Very shortly after that he started the acts complained of. She summoned the doctor and ultimately got a friend in the village to telephone and he was removed.

Having cited the definition, I think it is unnecessary to elaborate the reasons, which lead me to the conclusion that there was no condonation by reason of what happened in 1949. In those circumstances, I think that the petitioner is entitled to a decree and that the appeal should be allowed.

JENKINS L.J. I agree, and only desire to add, with respect to insanity as a defence to a charge of cruelty, that in the present case the medical evidence accepted by the commissioner was, as I understand it, to the effect that the husband, during the final period, not merely did not know that what he was doing was wrong, but did not even know the nature and quality of his acts, or, in other words, did not know what he was doing. I am satisfied that for the reasons given by my Lords a man who does not know what he is doing cannot be held to be guilty of cruelty to his wife or to treat his wife with cruelty. But I am not satisfield that the position is necessarily the same if a man's state of

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mind is such that while he does know what he is doing he does not know that what he is doing is wrong; and I would prefer to reserve that question for further consideration in a case in which it is necessary to the decision.

Appeal allowed.

Solicitors: *A. M. V. Panton; Official Solicitor.*

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June 8.

Davies J.

OZZARD-LOW *v.* OZZARD-LOW AND WONHAM.

Evidence—Admissibility—Statement made in a document—Witness beyond the seas—Possibility of examination before trial—Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *ss.* 1 (1) (5), 2.

The proviso to section 1 (1) of the Evidence Act, 1938, imposes upon the court the duty of deciding whether at the moment when the statement is tendered in evidence, and not at any time in the suit, "the maker . . . is beyond the seas and it is not reasonably "practicable to secure his attendance."

If the conditions laid down by the statute are satisfied, the document is admissible and a judge sitting alone has no discretionary power to reject it. But the fact that an order for an examination could have been obtained may well be a factor which should weigh heavily when the court considers what, if any, importance should be attached to the statement.

Infields Ld. v. *Rosen* (1939) 55 T.L.R. 377; [1939] 1 All E.R. 121 not followed.

APPLICATION for leave to admit affidavit evidence.

A husband alleged in his petition for divorce that his wife had committed adultery in Rangoon, Burma, with a named co-respondent, or alternatively with a man unknown, in 1951, and application was made on his behalf at the hearing for leave to read the affidavits of three Burmese servants in support of the charge of adultery. The application had previously been made to the registrar, who had adjourned it to the trial judge. In an affidavit in support of that application the husband said that after he had parted from his wife the servants had given him certain information. He had consulted the British consul as to the manner in which the testimony of these witnesses should be perpetuated, and the consul had made arrangements for the witnesses to be examined by an independent advocate nominated by the consul before a notary public in Rangoon on oath and for their testimony to be recorded in the form of affidavits. The husband further stated that he had been present when the witnesses gave their evidence, and that the certificate of the notary public had been certified and legalized by the consul. He also said that he had since tried to trace the witnesses, without success, and believed them to have left Rangoon. He submitted that great expense and delay would be caused in searching for the witnesses.

The report is confined as to the question whether or no these statements were admissible at the hearings under section 1 (1) of the Evidence Act, 1938.[1]

Gilbert Beyfus Q.C. and *D. Armstead Fairweather* for the husband.

R. J. A. Temple Q.C. and *H. S. Law* for the wife.

Melford Stevenson Q.C. and *L. G. Scarman* for the co-respondent.

The nature of the submissions and the cases cited in argument are contained in the judgment.

Davies J. In this case the husband alleges that the wife committed adultery with the co-respondent in Burma on various occasions in April, 1951, and in May and June, 1951, during periods when the husband himself was temporarily away from Burma, first in Singapore and then in England. In support of his case the husband seeks to put in evidence three affidavits by Burmese servants, a night-watchman and two drivers.

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[1] Evidence Act, 1938, s. 1 (1): "In "any civil proceedings where direct "oral evidence of a fact would be "admissible, any statement made by "a person in a document and tending "to establish that fact shall, on production of the original document, be "admissible as evidence of that fact "if the following conditions are satisfied, that is to say—(i) if the maker "of the statement either—(*a*) had "personal knowledge of the matters "dealt with by the statement; or (*b*) "where the document in question is "or forms part of a record purporting "to be a continuous record, made the "statement (in so far as the matters "dealt with thereby are not within "his personal knowledge) in the "performance of a duty to record "information supplied to him by a "person who had, or might reasonably be supposed to have, personal "knowledge of those matters; and "(ii) if the maker of the statement is "called as a witness in the proceedings: Provided that the condition "that the maker of the statement "shall be called as a witness need not "be satisfied if he is dead, or unfit "by reason of his bodily or mental "condition to attend as a witness, or "if he is beyond the seas and it is "not reasonably practicable to secure "his attendance, or if all reasonable "efforts to find him have been made "without success."

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The wife, together with her daughter, left Burma in October, 1951, and it appears that many months later the husband obtained statements from these three Burmese which were subsequently put into writing in English, sworn before an appropriate person in Rangoon and certified at the British consulate there. The husband has told me that this was done for the express purpose of tendering these affidavits in evidence under the Evidence Act, 1938, upon the hearing of the petition for dissolution of marriage which he was then minded to commence against his wife. He was apparently told by his legal advisers in Burma that the statements would be admissible.

The husband left Burma in April, 1952; and on July 9, 1952, he filed the present petition. The three affidavits, at which I have not yet looked, are now tendered in evidence by Mr. Beyfus on behalf of the husband.

It is admitted by Mr. Beyfus that the husband has at no time made any attempt to bring any of these three Burmese to this country; the husband took the view that on the ground of expense it was not reasonably practicable to bring them here to give evidence. It is also clear that at no time has any application been made in this suit on behalf of the husband for an order that the evidence of these men should be taken before an examiner or by whatever is the procedure appropriate in Burma at the present time.

With some little hesitation I have come to the conclusion that the husband's submission that it is not reasonably practicable to secure the attendance of these witnesses in this court is right. Therefore, at first sight, as the witnesses are admittedly beyond the seas, the proviso to section 1 (1) of the Evidence Act, 1938, applies and the condition that the maker of the statement shall be called as a witness need not be satisfied.

But it is argued by Mr. Temple for the wife and by Mr. Melford Stevenson for the co-respondent that that does not conclude the matter. "Attendance," it is argued, means not only attendance in court at the hearing but attendance as a witness at any time in the suit. And if it was at any time reasonably practicable to secure the attendance of a witness before an examiner or upon a commission or by any other means to give oral evidence and subject himself to cross-examination, then, it is said, the person who is seeking to tender the written statement of the witness fails to show that "it is not reasonably "practicable to secure his attendance" within the meaning of the proviso. But I do not think that that is the correct interpretation of the section. It is true that the words of section 1 (1) (ii), namely, " if the maker of the statement is called as a " witness in the proceedings," would plainly be satisfied if the witness had given evidence before an examiner. But in my judgment the words of the proviso impose upon the court the duty of deciding whether at the moment when the statement is tendered in evidence the maker is beyond the seas and it is not reasonably practicable to secure his attendance. The use of the present tense seems to me to indicate this conclusion with reasonable clearness. In my judgment, therefore, the proviso is satisfied in the present case and section 1 (1) (ii) does not apply.

But it is further argued by Mr. Temple that, even so, I have a discretion to reject these statements on the grounds, (a) that their contents are likely to be controversial, and (b) that the husband ought to have taken other and more satisfactory steps to obtain the evidence of those witnesses. That argument is based on a decision of Simonds J. in *Infields Ld.* v. *Rosen.*[1] In that case Simonds J. said[2]: " I will assume, for the purpose " of my ruling upon this matter, that Mrs. Emma Veith "—the person, living in Germany, whose statement was tendered in evidence—" is beyond the seas and that it is not reasonably " practicable to secure her attendance. . . . This is a statement " which appears to me to have been made expressly for the " purpose of its being given in evidence in this suit. Although, " according to the language of the Act, that is within its purview, " I have no doubt that that is the class of document to which " the section is not primarily intended to apply, and the court " must be exceedingly careful in allowing such a document to be " used as evidence. Further, I have to bear this in mind. This " is a statement in a document made by a lady who is in " Germany and available for examination and cross-examination " so far as that is permissible under letters of request. The " party seeking to adduce that document in evidence did not so " inform the other party to the suit. . . . Then I have also to " bear in mind the circumstance that this is a case in which there " is an acute controversy of fact." And, after setting out various other matters, he concluded: " In these circumstances, I shall, " in the exercise of my discretion, decline to allow this declara- " tion to be adduced in evidence in this case."

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[1] (1939) 55 T.L.R. 377; [1939] 1 All E.R. 121.

[2] [1939] 1 All E.R. 121–2.

With the utmost respect and with natural hesitation, I feel that I am unable to follow that decision. It seems to me to be plain that if the conditions laid down by the statute are satisfied, the document is admissible and that a judge sitting alone has no discretionary power to reject it. That view is, in my judgment, fortified by a consideration of section 1 (5) of the Act, which provides that "where the proceedings are with a jury, the court "may in its discretion reject the statement notwithstanding that "the requirements of this section are satisfied with respect "thereto, if for any reason it appears to it to be inexpedient in "the interests of justice that the statement should be admitted." If a discretionary power is expressly given in the case of a trial with a jury, it seems to follow necessarily that when a judge is sitting alone there is, if the requirements of the section are satisfied, no discretion at all and the document is admissible.

In my judgment, therefore, these documents are admissible. But, of course, in deciding that they are admissible I am saying nothing at all as to what weight I shall give to them when I have read them. Section 2 of the Act, in my view, plainly directs the court to exercise caution in regard to statements such as these. And the fact that the husband or his legal advisers could have obtained an order—as I imagine they certainly could have done—for the examination of these Burmese witnesses may well be a factor which should weigh heavily when I am considering what, if any, importance should be attached to those statements.

Statements admitted.

June 11, 1953. DAVIES J. dismissed the husband's petition with costs, and the co-respondent was dismissed from the suit with costs. His Lordship also dismissed the wife's cross-petition alleging cruelty.

Solicitors: *W. F. Foster, Hedge & Clare; Butt & Bowyer; Loxley & Preston.*

J. B. G.

IN THE ESTATE OF POSNER, DECD.
POSNER *v.* MILLER.

1953
Apr. 14.

Karminski J.

Probate—Legatee described as "wife" of deceased testator—Marriage alleged to have been bigamous—No allegation of fraud—Validity of bequest.

A false description of a legatee is not in itself sufficient to invalidate the gift; there must also be a fraudulent assumption of that character by the legatee and the testator must furthermore have been deceived by that fraud.

Kennell v. *Abbott* (1799) 4 Ves. 802; *Giles* v. *Giles* (1836) 1 Keen 685; *Wilkinson* v. *Joughin* (1866) L.R. 2 Eq. 319 applied.

ISSUE (in probate action).

The deceased, who died on November 18, 1951, duly executed his last will on January 24, 1950. By that will he appointed Barclays Bank Ld. (who renounced probate on January 21, 1952) as his executor and named Rose Posner as residuary legatee. The relevant words in the will were as follows: "Subject to and after payment of my just debts funeral and "testamentary expenses I give devise and bequeath all the real "and personal estate of or to which I shall die possessed or "entitled unto my wife Rose Posner for her own use and benefit "absolutely. . . ." Rose Posner died on March 24, 1952, and on May 3, 1952, the plaintiff in this action, Leah Posner, was granted letters of administration with the will annexed of the estate of Rose Posner. Leah Posner, in her capacity of personal representative of Rose Posner, now claimed letters of administration with the will annexed of the estate of the deceased. A caveat had been entered in the estate of the deceased on December 3, 1951, and warned on January 24, 1952. Appearance was entered by the defendant in this action as the sole surviving daughter of the deceased (by a former marriage) and as such entitled to share in the estate on an intestacy. The defendant alleged that the will had not been duly executed, and further alleged, in paragraph 3 of the defence: "The trusts of the said will have failed "and the plaintiff is not entitled to take under the said will and "has no beneficial interest in the estate of William Posner, "deceased. The plaintiff is therefore not entitled to propound "the said will nor to the grant of letters of administration of the "said estate." The substance of the case under this paragraph was that "Rose Posner referred to in . . . the statement of claim "as the residuary legatee is named in the will as 'my wife

"'Rose Posner.' The said Rose Posner was not the wife of the "deceased. On August 2, 1945, she went through a form of "marriage with the deceased while her husband, S. D., was "alive. At the time of the execution of the said will the "deceased did not know that the said Rose Posner was not his "lawful wife."

The plaintiff, by her reply, admitted that the defendant was the sole surviving daughter of the deceased, but denied that the defendant was his next-of-kin at the date of his death. She joined issue with the defendant and alleged that Rose Posner was lawfully married to the deceased on August 2, 1945, and in the alternative she denied that if Rose Posner were not the wife of the deceased the trusts of the will had failed or that she (the plaintiff) was not entitled to take under the will or had no beneficial interest in the estate of the deceased.

There was no allegation of fraud upon the pleadings.

On February 13, 1953, it was ordered by Barnard J. on summons that a preliminary issue be tried as to "whether "assuming that Rose Posner was not the lawful wife "of the deceased and that at the time of the execution of the "will the deceased did not know that she was not his lawful "wife, the words 'to my wife Rose Posner' in the will operate "as words of gift to the Rose Posner with whom the deceased "went through a ceremony of marriage on August 2, 1945."

C. Trevor Reeve for the plaintiff. To invalidate a gift by reason of misdescription it is necessary to show that there has been a fraud which has deceived the testator. The legacy failed in *Kennell* v. *Abbott*[1] because the testatrix had been deceived by the man with whom she had gone through a ceremony of marriage, and had believed right up to her death that she was his lawful wife; but in *Giles* v. *Giles, Penfold* v. *Penfold*,[2] the plaintiff was held entitled to the legacy because in that case the testator had been aware of the plaintiff's existing marriage to another man and there had been no fraud upon the testator. In *In re Petts*[3] the legatee had been separated for 19 years from her husband and had married the testator by the description of "a "widow." She had, about that time, heard a report that her husband was living and had made some loose inquiries, but believed that he was dead. The court was of the opinion that the evidence showed no fraud on her part towards the testator and held that she was entitled to the legacies. The gift was invalidated in *Wilkinson* v. *Joughin*[4] because it was found[5] that the legatee had "imposed in a gross manner upon the testator." [Reference was also made to *In re Boddington, Boddington* v. *Clariat*,[6] where there had been a decree of nullity after the date of the will on the ground of the testator's impotence.] If fraud is to be relied on, it must be strictly pleaded: *Redgrave* v. *Hurd*.[7]

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[1] (1799) 4 Ves. 802.

[2] (1836) 1 Keen 685.

[3] (1859) 27 Beav. 576.

Harry Samuels for the defendant. *Kennell* v. *Abbott*[8] established the rule that a legacy fails if given to a person under a particular character which he or she has falsely assumed and which alone can be supposed to have been the motive of the bounty. Whether the character assumed by a person is true or false is a pure question of fact; and fraud is not an essential ingredient. In *In re Wagstaff, Wagstaff* v. *Jalland*,[9] the gift was only held to be good on the basis that the testator knew at the time he went through the ceremony of marriage that the marriage was invalid.

[He said that an application might be made to add a charge of fraud to the pleadings if the issue were decided against him.]

Karminski J. [after stating the facts and referring to the nature of the issue]: The issue assumes two things; first of all, that Rose Posner was not the wife of the deceased, and secondly that the deceased did not know she was not his lawful wife. Those matters, I understand, may be the subject of serious dispute hereafter; but for the purposes of this issue I have to decide whether or not, under those circumstances, the will operates as a gift to Rose Posner.

The principle of law involved is a short one, but it is not, apparently, exactly covered by any authority. The first case which was cited to me was the well-known case of *Kennell* v. *Abbott*,[1] and it will suffice if I extract from that report one passage from the judgment of the Master of the Rolls[2]: "Falsam causam "legato non obesse verius est, quia ratio legandi legato non co-"haeret: sed plerumque doli exceptio locum habebit, si probetur "alias legaturus non fuisse." Summarizing that passage in English, he said this: "The meaning is, that a false reason given "for the legacy is not of itself sufficient to destroy it: but there

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[4] (1866) L.R. 2 Eq. 319.

[5] Ibid. 322.

[6] (1883) 22 Ch.D. 597.

[7] (1881) 20 Ch.D. 1.

[8] 4 Ves. 802.

[9] [1908] 1 Ch. 162; 24 T.L.R. 136.

[1] 4 Ves. 802.

[2] Ibid. 808.

"must be an exception of any fraud practised; from which it may "be presumed, the person giving the legacy would not, if that "fraud had been known to him, have given it. That from a book "of great authority seems to be the principle of the Civil Law." After discussing the questions of fact involved, the Master of the Rolls continued[3]: "Under these circumstances I am warranted "to make a precedent; and to determine, that, wherever a legacy "is given to a person under a particular character, which he has "falsely assumed, and which alone can be supposed the motive "of the bounty, the law will not permit him to avail himself of "it; and therefore he cannot demand his legacy."

That case has since been frequently followed and discussed. It was referred to by Lord Langdale M.R. some 35 years after *Kennell* v. *Abbott*[4] in *Giles* v. *Giles*.[5] Extracting what I believe to be the principles in that case I will again content myself with quoting a short passage from the judgment of Lord Langdale[6]: "It is clear that, in point of law, a mere misdescription of a "legatee will not defeat the legacy; and it is equally clear that "a legacy given to a person in a character which the legatee does "not fill, and by the fraudulent assumption of which character "the testator has been deceived, will not take effect. That was "the principle upon which the case of *Kennell* v. *Abbott*[7] was "decided, and the soundness of that decision has never been "questioned." The Master of the Rolls was, I think, demanding two things as being sufficient to defeat the gift. One is a legacy given to a person in a character which the legatee does not fill. But that by itself is not enough. In order to defeat the legacy there must also be a fraudulent assumption of that character; and furthermore, the testator must have been deceived by that fraud. In the present case there is no allegation on the pleadings by way of defence of fraud against Rose Posner, though I am told that an application may be made to amend the pleadings to add such a charge. I would say at once that as at present advised I do not think that evidence of fraudulent misrepresentation should be admitted in a probate action unless it has been fully pleaded.

The principle has been followed in other cases. In *Wilkinson* v. *Joughin*,[8] the income of a property was given by a testator to a woman whom he described as his wife, but who at the time of the marriage ceremony had a husband living. It was said that

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[3] 4 Ves. 809.

[4] Ibid. 802.

[5] 1 Keen 685.

[6] Ibid. 692.

[7] 4 Ves. 802.

[8] L.R. 2 Eq. 319.

that bequest to her was void by reason of her fraud. It appears that there was a good deal of investigation in that case to decide whether or not the wife had misrepresented her status, and whether, if she had misrepresented her status, such misrepresentation had been wilful. The gist of the argument advanced by counsel on her behalf is summed up in the last two sentences of his argument[9]: "The mistake was an honest one on both "sides. No fraud having been committed the bequests ought to "prevail." In a short judgment, Sir John Stuart V.-C. said[10]: "In my opinion the bequest in favour of Adelaide Ward is void. "She has sworn in her answer that which has been distinctly "disproved. The evidence shows that she imposed in a gross "manner upon the testator. Therefore, there must be a declara-"tion to the effect that the bequest to Adelaide Ward, the "pretended wife of the testator, is wholly void, and then there "must be the usual decree for administration." And the Vice-Chancellor pointed out,[11] "But in the case referred to of *Kennell* "v. *Abbott*,[12] Lord Alvanley took care to distinguish between the "cases of an innocent and a fraudulent legatee."

I do not think that it is necessary to investigate the law further. Mr. Reeve, in his argument submitted that a false description by itself does not invalidate a gift unless the gift is procured by the fraud of the person falsely described. As the case is at present constituted, there is no allegation of procuring by fraud, and although Mr. Samuels has argued that fraud is not essential, I believe, on authority, that it is. That being so, I answer the issue before me in this way: Assuming, as the issue directly assumes, that Rose Posner was not the lawful wife of the deceased, and further, that the deceased at the time of the execution of his will did not know she was not his wife, these assumptions do not operate to bar the legacy to her under the will. I therefore decide the issue in favour of the plaintiff.

Judgment for the plaintiff.

Solicitors: *Warren & Warren for Rudd, Moorfoot & Davenport, Westcliff-on-Sea; Maxwell & Lawson.*

J. B. G.

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[9] L.R. 2 Eq. 321.

[10] Ibid. 322.

[11] Ibid. 322.

[12] 4 Ves. 802.

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